

~~in the Supreme Court of the~~
United States

OCTOBER TERM, 1972

NO. 72-1465

RAYMOND K. PROCUNIER, Director,
California Department of Corrections,
et al,

Appellants,

vs.

ROBERT MARTINEZ, et al,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA.

APPEAL DOCKETED April 28, 1973

PROBABLE JURISDICTION NOTED June 18, 1973.

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Filed: U.S.
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Northern District
of California
July 6, 1972.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ, and)
WAYNE EARLEY, individually)
and on behalf of all others)
similarly situated,)
Plaintiffs,)

v.

RAYMOND K. PROCUNIER,)
Director of the California)
Department of Corrections,)
and LOUIS S. NELSON,)
Warden, San Quentin Prison,)
Defendants.)

No. C-71 543 ACW
AMENDED COMPLAINT

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1343(3), 1343(4), 2201 and 2281. This is a suit authorized by 42 U.S.C. Section 1983 to redress the deprivation under color of state law of rights, privileges and immunities secured by the First and Sixth Amendments and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. This is also a proceeding for a declaratory judgment as to plaintiffs' constitutional rights to be free from such deprivation by state prison officials.

PARTIES

2. Plaintiff ROBERT MARTINEX is a citizen of the United States and a resident of the State of California. He is imprisoned under a judgement of conviction rendered by a Superior Court of the State of California. He is now being held in the California Mens Colony-East at San Luis Obispo, under the jurisdiction of the California Department of Corrections. At the time this action was filed he was incarcerated in San Quentin Prison where this cause of action arose.

3. Plaintiff WAYNE EARLEY is a citizen of the United States and a resident of the State of California. He is imprisoned under a conviction of a Superior Court of the State of California. He is now being held in San Quentin Prison, under the jurisdiction of the California Department of Corrections.

4. Defendant RAYMOND K. PROCUNIER is Director of the California Department of Corrections, (hereinafter, CDC), and as the chief administrator thereof is responsible for its general management and control. Under California Penal Code Section 5058 he is empowered to prescribe rules and regulations for the administration of the prisons and to change them at his pleasure. Exercising such power he promulgated the Rules complained of herein. He is sued individually and in his official capacity as Director.

5. Defendant LOUIS S. NELSON is Warden of San Quentin Prison. He is responsible for the promulgation of rules and policies implementing the Director's Rules, as well as those matters not specifically covered by the Director's Rules. He supervises and manages San Quentin Prison. He is sued individually and in his official capacity as Warden.

CLASS ACTION

6. Plaintiffs bring this action on their own behalf and, pursuant to Rule 23(b) (2) of the Federal Rules of Civil Procedure, on behalf of all inmates of the California Department of Corrections affected by the policies, practices or acts of defendants complained of herein. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims and defenses of plaintiffs are typical of the claims and defenses of the class; plaintiffs will fairly and adequately protect the interests of the class. Defendants have acted on grounds

generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

COUNT I

7. Members of the plaintiff class who want to communicate by mail are required to submit all letters to prison officials who censor them to determine whether they conform to a variety of broad and general regulations promulgated by defendant PROCUNIER. The applicable regulations include Rule 2402 (8), that prohibits inter alia, letters that "are lewd, obscene or defamatory; contain prison gossip or discussion of other inmates; or are otherwise inappropriate." Plaintiffs' letters must also conform to Director's Rule 1201, Inmate Behavior, which directs them not to "agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence"; and Director's Rule 1205(d) and (f) which define as "contraband" "any writings . . . expressing inflammatory political, racial, religious, or other views or beliefs. . . . which if circulated among other inmates, would in the judgment of the warden or superintendent tend to subvert prison order or discipline. . . ."

8. No criteria or standards are furnished to the mailroom staff to guide them in deciding whether a particular writing violates any prison rule or unpublished policy. The vague rules are applied in an arbitrary, unpredictable, and discriminatory way that suppresses legitimate expression. Letters written by the named plaintiffs and by members

of the class have been treated as improper correspondence because they criticized prison officials, complained of mistreatment of themselves or others, or expressed unpopular political, religious or racial opinions.

9. Plaintiffs are given no hearing on whether or why their letters should be deemed impermissible and there is no appeal from the ex parte decision on this made by the mailroom personnel.

10. When the mailroom staff decides that a prisoner's letter constitutes "improper correspondence", they are authorized by defendants to take the following actions, alone or in combination: (1) refuse to mail the letter and return it to the prisoner; (2) submit a disciplinary report which may lead to suspension of the prisoner's mail privileges as specifically authorized by Director's Rule D2401, or to more severe punishment including solitary confinement; (3) photocopy the letter and place it or a summary of its contents in the inmate's permanent file. Even letters which are not held to violate any rule may be photocopied and placed in the inmate's file when the mailroom staff believes that they reveal a "bad attitude" toward the prison staff or society or express political views of which the staff disapproves. On information and belief letters placed in this file are referred to the prison classification committee which determines the inmate's housing and work assignments, and to the Adult Authority which rules on prisoners' parole eligibility. Director's Rule 1205 (f) (Administrative Bulletin No. 71/26, June 14, 1971)

specifically authorizes the retention of "contraband" writings for referral to the Adult Authority. (Plaintiffs' Exhibits A through F attached hereto illustrate the operation and effect of the CDC mail rules challenged herein.)

11. On information and belief, plaintiffs MARTINEZ and other members of the class have received unfavorable treatment from prison officials and the Adult Authority because of their disapproval of opinions and attitudes revealed in plaintiffs' letters.

12. Members of the plaintiff class cannot predict when their letters may be deemed to violate prison rules. In order to avoid punishment for violation they are forced to omit all but the most innocuous expression from their letters to their friends and families. Fear of punishment or adverse treatment discourages them from freely expressing their true thoughts and feelings. The threat of unpredictable punishment severely restricts plaintiffs' freedom to communicate by mail with their friends and families.

13. The censorship carried out pursuant to defendants' Rules is not limited to the narrow purpose of discovering and preventing escapes, smuggling and other criminal activity. The broad censorship authorized by defendants and carried out by their agents does not serve any compelling state interest, but it does suppress legitimate expression. By promulgating and enforcing the Rules regarding use of the mail, defendants violate plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

COUNT II

14. The allegations of paragraphs 1 through 13 are repeated and realleged as though fully set forth herein.

15. The Rules promulgated by defendant PROCUNIER prohibit prisoners from writing to attorneys unless "the subject matter relates to a legal case, proceeding or matter involving the inmate" (Mail and Visiting Manual, Section MV-I-02). All letters to attorneys are read by mailroom staff to determine whether they are "legitimate legal mail" as defined above. (Id.). However, the mailroom guards have no legal training and they are not provided with any criteria to determine whether a letter is "legitimate legal mail." If they decide it is not, they refuse to mail it and return it to the prisoner. They may also file disciplinary reports charging prisoners with violating prison regulations, such as those summarized in paragraph 7 above, resulting in loss of mail privileges or other more severe punishment. In addition, a copy of the offending letter or a summary of its contents may be placed in the prisoner's file, and, on information and belief, may be relied upon by prison authorities or by the Adult Authority as the basis for unfavorable treatment of the inmate, including assignment to the segregation section of the prison or denial of parole.

16. Censorship of their correspondence with attorneys has obstructed the named plaintiffs and members of the plaintiff class in obtaining access to the courts. Most members

of the plaintiff class are indigent and unable to retain counsel to represent them in bringing their claims of constitutional deprivations before the courts. They are dependent upon the services of unpaid attorneys who are willing to represent them because of the apparent merit of their cases. In order to interest attorneys in representing them, it is necessary for them to write about their cases in great factual detail. In order for them to answer attorneys' requests for further information, it is often necessary for them to include information which might be viewed unfavorably by prison authorities. In seeking and receiving representation in cases concerned with prison conditions, it is necessary for prisoners to discuss and describe the actions of prison personnel. They are extremely restricted in communicating all such information by the fact that their correspondence is read by prison personnel.

17. Even when members of the plaintiff class are represented by attorneys, time, distance and expense make correspondence an essential means of consultation. Plaintiffs' ability to be candid with their attorneys is severely hampered by the knowledge that their letters are read by prison personnel, and their attorneys are thereby hindered in affording them effective representation.

18. Censorship of correspondence between plaintiffs and their attorneys deprives them of the benefits of the attorney-client privilege created by California law and

enjoyed by all California citizens who are not incarcerated.

19. Many members of the plaintiff class are engaged in some stage of criminal proceedings, either on appeal, or by collateral attack, or as defendants in prosecutions based on conduct alleged to have occurred since their incarceration. Their correspondence with the attorneys representing them in their criminal proceedings is subject to the same scrutiny as all other prisoner correspondence with attorneys.

20. Defendants' Rules prohibiting confidential correspondence between plaintiffs and attorneys violates plaintiffs' right to petition for redress of grievances, their right of access to the courts, and their right to counsel, guaranteed by the First and Sixth Amendments and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

COUNT III

21. The allegations of paragraphs 1 through 6 and 15 through 20 are repeated and realleged as though fully set forth herein.

22. Rule MV-IV-02 of the Mail and Visiting Manual promulgated by defendant PROCUNIER permits prisoners to be interviewed in person by their attorney-of-record, or by his designated representative who must either be a member of the State Bar of an investigator licensed by the State. The rule prohibits interviews by para-professional assistants to attorneys.

23. Many members of the plaintiff class are indigent and unable to retain

counsel or paid investigators. Others are not totally indigent but have extremely limited financial resources. Defendants' refusal to permit them to consult with unlicensed investigators of good reputation who are supervised by members of the Bar severely handicaps prisoners seeking access to the courts.

24. Since filing this complaint plaintiff MARTINEZ has been transferred several times. Between January and June of 1972 he has been confined in institutions located in Chino, Fallbrook, Crestline and San Luis Obispo, California. Each of these institutions is several hundred miles from the offices of his attorneys in this action. His attorneys wanted to interview him to obtain information relevant to this case. In addition, they wanted to communicate their views about the merits of the case and the strategy to be followed, confidentially and without being subjected to monitoring by defendants or their agents. However, the time required for a round trip of this distance prevented plaintiff's attorneys from visiting him personally. Therefore they asked the CDC to permit their assistant, a third-year student at Hastings College of the Law, to interview plaintiff. Permission was denied on the basis of the CDC policy established by Rule MV-IV-02 of the Mail and Visiting Manual. As a result, plaintiff MARTINEZ and his attorneys have been unable to consult confidentially concerning this case, much delay has resulted from the need to consult by mail, and his attorneys have been handicapped in preparation of this case.

25. Plaintiff WAYNE EARLEY wrote to one of his attorneys herein, requesting legal assistance. His attorneys deemed a personal interview essential before they would agree to represent him, or could obtain the information needed to prepare this case. Because defendants refused to allow his attorneys' para-professional assistant to visit and interview plaintiff, a substantial delay occurred before a personal interview could be arranged, all supplementary consultation was necessarily carried on by mail, and his attorneys have been hampered in preparation of this case. (Plaintiffs' Exhibits G through L are copies of correspondence between one of their attorneys and the wardens of three different prisons, concerning visitation by her para-professional assistant.)

26. By promulgating and enforcing the Rule prohibiting prisoners from being interviewed by the para-professional assistants to attorneys from whom they seek or are receiving legal assistance defendants deprive plaintiffs and members of the class they represent of their right to effective assistance of counsel, and access to the courts, guaranteed by the First and Sixth Amendments and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

COUNT IV

27. The allegations of paragraphs 1 through 6 above are repeated and re-alleged as though fully set forth herein.

28. Director's Rule 2402(10), promulgated by defendant PROCUNIER and enforced by defendant NELSON prohibits prisoners from sending registered or certified mail, or any communication requesting a return receipt, without permission of the institutional head. There are no standards to guide the institutional head in deciding whether to grant permission. Prisoners encounter prolonged periods of delay waiting for permission to use such mail service, and have been denied permission arbitrarily and without any explanation, even when they had sufficient funds in their prison trust accounts to cover the charge for such mail service.

29. Prisoners' letters to courts, judges and public officials frequently go unanswered for considerable periods of time. Plaintiffs often experience considerable anxiety about whether their outgoing letters have been promptly forwarded by prison authorities and received by their addressees. Their concern about whether their letters had gone astray would be eliminated if they were permitted to send such letters by registered or certified mail requesting a return receipt.

30. There is no compelling state interest justifying defendants' Rule requiring inmates who have the funds needed to send letters by certified or registered mail to obtain special permission to do so. By promulgating and enforcing this Rule, defendants violate plaintiffs' rights under

the First, Sixth and Fourteenth Amendments to the United States Constitution.

COUNT V (Individual Claim)

31. The allegations of paragraphs 1, 2, 4 and 5 above are repeated and realleged as through fully set forth herein.

32. Director's Rule 2402(13), promulgated and enforced by defendants, prohibits prisoners from corresponding with inmates or former inmates of any institution without permission of the institutional head. The Rule contains no standards to guide the institutional head in deciding whether to grant permission. Acting under this Rule, prison officials have refused to grant plaintiff MARTINEZ permission to write to his co-defendant, Carolyn Hershelman, even though such correspondence is essential for him to obtain specific information needed to prepare a petition for writ of habeas corpus challenging his criminal conviction. Their refusal was arbitrary and unjustifiable. Any legitimate penal interest in restricting such correspondence would be adequately protected by censoring the mail to ensure that it was used solely for the authorized purpose. By prohibiting plaintiff from obtaining this essential information, defendants violated his right to due process and access to the courts, and to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

BASIS FOR EQUITABLE RELIEF

33. Plaintiffs and members of the plaintiff class on behalf of whom this suit

is brought have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for a declaratory judgment and an injunction is their only means of securing adequate relief. Plaintiffs and members of the plaintiff class are now suffering and will continue to suffer irreparable injury from defendants' practices complained of herein.

34. WHEREFORE, plaintiffs respectfully pray that this Court enter judgment granting plaintiffs:

(a) a declaratory judgment that defendants' Rules, policies and practices complained of herein violate plaintiffs' rights and the rights of members of the plaintiff class secured by the First and Sixth Amendments and by the due process and equal protection clauses of the Fourteenth Amendment;

(b) an injunction prohibiting defendants, their agents and subordinates from refusing to mail, photocopying, placing in the inmate's file, or referring to the Adult Authority or to the prison classification committee any communications from plaintiffs that do not relate to criminal activity; further prohibiting them from penalizing plaintiffs in any way or depriving them of any privileges or benefits because of expression contained in their letters that does not relate to any criminal activity; further prohibiting them from enforcing and applying Director's Rule 1201 (Inmate Behavior), 1204 (Offensive Language), 1205 (contraband) or 2402(8) (mail topics) to any letters that do not relate to

criminal activity; and further requiring them to expunge from plaintiffs' files any reference to letters they have written in the past which are entitled to the protection of the First, Sixth or Fourteenth Amendments;

(c) an injunction prohibiting defendants, their agents and subordinates from reading, censoring, copying, withholding or delaying any communications between California Department of Corrections prisoners and attorneys;

(d) an injunction requiring defendants to permit members of the plaintiff class to be interviewed in person by para-professional assistants to attorneys from whom they have sought or are receiving legal assistance;

(e) an injunction prohibiting defendants from denying the use of registered or certified mail to any member of the plaintiff class who has the funds to cover the charge for such services, and further prohibiting defendants from enforcing Director's Rule 2402(10) which requires special permission for such mail;

(f) an order directing defendants to permit plaintiff ROBERT MARTINEZ to correspond with his co-defendant Carolyn Hershelman solely for the purpose of obtaining information needed to prepare a petition for writ of habeas corpus;

(g) plaintiffs' costs of this suit together with reasonable attorneys fees;

(i) such other and further relief as the Court may deem just and proper.

ALICE DANIEL
Attorney for Plaintiffs

PLEASE TAKE NOTICE THAT on Friday September 29, at 9:30 a.m. or as soon thereafter as counsel may be heard, the undersigned will move in the courtroom of the Honorable Albert C. Wollenberg, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing this action on the ground that the complaint fails to state a claim against the defendants upon which relief can be granted.

This motion will be based on this Notice, the pleadings, records and files herein, and the Memorandum of Points and Authorities attached hereto.

DATED: September 8, 1972

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of the State of California

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Filed: Sept. 13, 1972

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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
Plaintiffs,	)	NO. C-71 543 ACW
	)	(Three-Judge Court)
vs.)	
RAYMOND K. PROCUNIER,	)	<u>REQUEST FOR ADMISSIONS</u>
et al.,)	
Defendants.)	
)	

Plaintiffs hereby request, pursuant to Rule 36 of the Federal Rules of Civil Procedure, that defendants admit, for the purposes of this action, the truth of the following matters:

1. Prisoners confined in institutions under the jurisdiction of the California Department of Corrections who desire to communicate by mail are required to submit outgoing letters to prison officials who censor them to determine whether they conform to rules promulgated by defendant Procunier, including the following:

(a) Director's Rule 2402(8), prohibiting letters that "are lewd, obscene or defamatory; contain prison gossip or discussion of other inmates; or are otherwise inappropriate."

(b) Director's Rule 1201 (Inmate Behavior), forbidding inmates to "agitate, unduly complain, magnify grievances or behave in any way which might lead to violence."

(c) Director's Rule 1205(d) and (f), defining "contraband" as "any writings. . .expressing inflammatory political, racial, religious, or other views or beliefs. . .which if circulated among other inmates, would in the judgment of the warden or superintendent tend to subvert prison order or discipline." Letters may constitute contraband writings within this Rule.

2. Outgoing letters submitted for mailing by prisoners and incoming letters addressed to prisoners are read by the mailroom staff in the institution. No criteria or standards, other than those contained in the Director's Rules set forth in 1 above, are furnished to the mailroom staff to guide

them in deciding whether a particular letter violates any prison rule or policy.

3. Letters found objectionable by the mailroom staff may be rejected for mailing for any of the reasons listed in Exhibit A to the amended complaint filed herein.

4. Letters found objectionable by mailroom staff may also be rejected for mailing for other reasons as deemed appropriate by institutional personnel, and such reasons may then be noted in the blank spaces on Exhibit A to the amended complaint.

5. When the mailroom staff decides that a prisoner's letter constitutes improper correspondence, they are authorized by defendants to take the following actions, alone or in combination:

(a) refuse to mail the letter and return it to the prisoner;

(b) submit a disciplinary report which may lead to suspension of the prisoner's mail privileges as specifically authorized by Director's Rule D2401 or to more severe disciplinary punishment up to and including confinement in segregation;

(c) photocopy the letter and place it or a summary of its contents in the prisoner's permanent file.

6. Except in a case where a prisoner is charged with a disciplinary infraction as a result of writing a letter, a prisoner whose letter is rejected for mailing by mailroom staff is given no hearing or opportunity to be heard before an impartial tribunal to contest such rejection.

7. The mailroom staff may photocopy letters and place them in the inmate's file, even if the letters do not violate any rule, if they believe that the letters reveal an inappropriate attitude toward prison staff or society or express radical political views.

8. Letters placed in an inmate's file are referred to and consulted by the institution classification committee which determines the inmate's housing and work assignments.

9. Letters placed in a prisoner's file are made available to and consulted by the Adult Authority which rules on the prisoner's parole eligibility.

10. Director's Rule 1205(f) (Administrative Bulletin No. 71/26, June 14, 1971) authorizes the retention of "contraband" writings, which may include letters, for referral to the Adult Authority.

11. The Mail and Visiting Manual, Section MV-I-02, promulgated by defendant Procunier, prohibits prisoners from writing letters to attorneys unless "the subject ~~matter~~ relates to a legal case, proceeding or matter involving the inmate."

12. All prisoner letters to attorneys must be submitted to mailroom staff to determine whether they are "legitimate legal mail" as specified in the Mail and Visiting Manual.

13. All incoming letters from attorneys are subject to the same process as in 12 above.

14. Mailroom staff have no legal training and they are not provided with any standards or criteria for determining whether a

letter is or is not "legitimate legal mail."

15. If mailroom staff decide that a letter written by a prisoner to an attorney does not constitute proper legal correspondence, they may take the following actions, alone or in combination:

(a) refuse to mail the letter and return it to the prisoner;

(b) submit a disciplinary report which may lead to suspension of the prisoner's mail privileges as specifically authorized by Director's Rule D2401 or to more severe disciplinary punishment up to and including confinement in segregation;

(c) photocopy the letter and place it or a summary of its contents in the prisoner's permanent file.

16. Reading of mail to and from attorneys by prison personnel applies generally, including: (a) in cases where prisoners are engaged in some stage of criminal proceedings, either on appeal, on collateral attack or as defendants in prosecutions based on conduct alleged to have occurred during their incarceration; and (b) in cases like the present case, where prisoners sue prison officials alleging denial of their civil rights.

17. The Mail and Visiting Manual, Section MV-IV-02, promulgated by defendant Procunier, authorizes personal interviews of prisoners by their attorneys of record or the designated representative of an attorney of record. However, the designated representative

of an attorney must be either a member of the California Bar or an investigator licensed by the State of California. Interviews by para-professional assistants, law students or unlicensed investigators are prohibited.

18. A majority of the prisoners in custody under the jurisdiction of defendants are indigent and financially unable either to retain paid counsel or to hire paid licensed investigators.

19. In February and March, 1972, counsel for plaintiff Martinez requested permission for their assistant, a third-year law student at Hastings College of Law, to interview plaintiff Martinez, but permission was denied on the basis of the policy of the California Department of Corrections as set forth in the Mail and Visiting Manual, Section MV-IV-02.

20. Director's Rule 2402(10), promulgated by defendant Procunier and enforced by defendant Nelson, prohibits prisoners from sending registered or certified mail, or any communication requesting a return receipt, without permission of the institutional head. There are no standards or criteria to guide the institutional head in deciding whether to grant or withhold permission.

21. Prisoners desiring to send registered or certified mail, or communications requesting return receipts, have been denied permission to do so even when they had sufficient funds in their prison trust accounts to cover the charges for such mail service.

22. Director's Rule 2402(13), promulgated by defendant Procunier and enforced

by defendant Nelson, prohibits prisoners from corresponding with inmates or former inmates of any institution without permission of the institutional head. There are no standards or criteria to guide the institutional head in deciding whether to grant or withhold permission.

23. Acting under Director's Rule 2402(13), defendant Procunier's subordinates have refused to grant plaintiff Martinez permission to write to his co-defendant Carolyn Hershelman, even though plaintiff asserted that such correspondence was needed to obtain information to prepare a petition for writ of habeas corpus challenging his criminal conviction.

24. Defendants admit the genuineness of the copy of the disciplinary report attached as Exhibit B to the amended complaint.

25. Defendants admit the genuineness of the copy of the letter attached as Exhibit C to the amended complaint. Such letter accurately states the policy of the California Department of Corrections of prohibiting inmates from writing material in letters "that is discriminatory or derogatory toward individuals or races."

26. Defendants admit the genuineness of the copy of the letter attached as Exhibit D to the amended complaint.

27. Defendants admit the genuineness of the copy of the letter attached as Exhibit E to the amended complaint.

28. The newspaper article attached as Exhibit F to the amended complaint accurately

states that a San Quentin inmate was charged in a disciplinary proceeding with violation of Director's Rule 1201, possessing and writing militant material, a letter.

29. Defendants admit the genuineness of the copies of the letters attached as Exhibits H, J and L to the amended complaint. Such letters accurately state the policy of the California Department of Corrections of not permitting interviews of inmates by law student assistants to attorneys.

30. All Director's Rules and sections of the Mail and Visiting Manual referred to herein apply on a state-wide basis to all institutions under the jurisdiction of the California Department of Corrections.

PLEASE TAKE NOTICE that the above matters are deemed admitted unless, within thirty days after service hereof, defendants serve upon the undersigned a written answer or objection complying with Rule 36(a) of the Federal Rules of Civil Procedure.

DATED: September 12, 1972

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Filed: 9/13/72

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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,	)	NO. C-71 543 ACW
	)	(Three-Judge Court)
Plaintiffs,)	
)	
vs.	)	REQUEST FOR
	)	<u>PRODUCTION OF DOCUMENTS</u>
RAYMOND K. PROCUNIER,)	
et al.,)	
)	
Defendants.)	
)	

Plaintiffs hereby request, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that defendants produce for inspection and copying the following documents:

1. The entire central files of plaintiffs Robert Martinez and Wayne Earley. (These files are to be produced in their entirety, as they existed on September 12, 1972, together with (a) all miscellaneous matter previously removed therefrom but which, on said date, was still in the possession, custody or control of defendants, and (b) all items inserted therein from said date through the actual date of inspection.)

2. The associate warden-custody files (the "AW" file) for plaintiffs Martinez and Earley.

3. Any and all files, notes, logs or other records disclosing the fact that prisoner letters deemed improper by institutional personnel have been rejected for mailing.

PLEASE TAKE NOTICE that such documents shall be produced for inspection and copying at 10:00 a.m. on October 17, 1972, at San Quentin State Prison.

DATED: September 12, 1972.

WILLIAM BENNETT TURNER
Attorney for Plaintiffs

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Filed: Oct. 13, 1972

Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,	)	Civil Action
)	
Plaintiffs,	)	No. C-71 543 ACW
	)	(Three-Judge Court)
vs.)	
	)	ANSWER TO REQUEST
RAYMOND K. PROCUNIER,	)	<u>FOR ADMISSIONS</u>
et al.,)	
)	
Defendants.)	
)	

Defendant R. K. Procunier hereby answers with respect to plaintiffs' request for admissions in the above-entitled case, which request was served on counsel for defendants on September 13, 1972, and states as follows:

Item 1: (Requests for admissions are attached).

Item 1 is true.

Item 2:

Item 2, if amended to the effect that the prisoners' letters may be read and that mail room staff or other employees are designated by the Warden may inspect the letters, is true.

Item 3:

It is my understanding that the Warden of the State Prison at San Quentin is responding to this item.

Item 4:

It is my understanding that the Warden of the State Prison at San Quentin is responding to this item.

Item 5:

Item 5 is true.

Item 6:

Item 6 is not true; there is an established appeal procedure whereby any inmate can air his complaint or grievance, including rejection for mailing by mail room staff. The appeal procedure usually involves review by individual upper level staff members and not by a panel or "tribunal".

Item 7:

Item 7 is true.

Item 8:

Item 8 is true.

Item 9:

Item 9 is partially true; the prisoner's file is available to the Adult Authority at the time of the prisoner's hearing. The Adult Authority members do not routinely review the file but may ask for and review the prisoner's file if they wish.

Item 10:

Item 10 is true.

Item 11:

Item 11 is true if such letters are designated as legal business mail by the prisoner.

Item 12:

It is my understanding that the Warden of the State Prison at San Quentin is responding to this item.

Item 13:

It is my understanding that the Warden of the State Prison at San Quentin is responding to this item.

Item 14:

Item 14 is true.

Item 15:

Item 15 is true except with respect to Section C which is not true.

Item 16:

Item 16 is not necessarily true in that inspection of such mail is not limited to inmates who are involved in specific types of litigations.

Item 17:

Item 17 is true except that with respect to the last sentence, such interviews by sub-professional assistants, etc., have been permitted when specifically ordered by the court.

Item 18:

I cannot respond to this item. We do not know the extent to which the prisoners under the custody of the Department of Corrections are indigent, and the research

necessary to provide an intelligent response to the question would require resources not readily available to the department. It is my impression that a great many of the inmates committed to the department are indigent.

Item 19:

I cannot respond to this item, not having the inmate file at my immediate disposal.

Item 20:

It is my understanding that the Warden of the State Prison at San Quentin will respond to this item.

Item 21:

It is my understanding that the Warden of the State Prison at San Quentin will respond to this item.

Item 22:

Item 22 is true.

Item 23:

I cannot respond to this item, not having the inmate file at my immediate disposal.

Items 24 through 29:

It is my understanding that the Warden of the State Prison at San Quentin will respond to these items.

Item 30:

Item 30 is true.

Dated: October 6, 1972.

R. K. PROCUNIER
Director of Corrections

THOMAS A. BRADY
Deputy Attorney General

EVELLE J. YOUNGER, Attorney General
 of the State of California
 EDWARD A. HINZ, JR., Chief Assistant
 Attorney General--Criminal Division
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Original filed
 Oct. 27, 1972
 Clerk, U.S. Dist.
 Court,
 San Francisco

Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
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Plaintiffs,)	
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)	
RAYMOND K. PROCUNIER,)	
et al.,)	
)	
Defendants.)	

ANSWERS OF DEFENDANT LOUIS S. NELSON
 TO PLAINTIFFS' INTERROGATORIES

Defendant Louis S. Nelson submits the following answers to the plaintiffs' interrogatories.

INTERROGATORY NO. 1:

State the total number of prisoners presently confined in institutions under the jurisdiction of the California Department of Corrections.

ANSWER TO NO. 1:

As of September 27, 1972, there were 19,196 prisoners confined in institutions under the jurisdiction of the California Department of Corrections.

INTERROGATORY NO. 2:

State the total number of prisoners presently confined at San Quentin State Prison.

ANSWER TO NO. 2:

As of September 27, 1972, 1,538 prisoners were confined at San Quentin State Prison.

INTERROGATORY NO. 3:

List the names of all persons presently serving, whether part-time or full-time, as mailroom staff or censors at San Quentin State Prison, and state in addition (a) any special qualifications such persons have for this position, including any special education or training, (b) the length of time such persons have been employed by the California Department of Corrections, and (c) the length of time such persons have been employed as mailroom staff or censors.

ANSWERS TO INTERROGATORY NO. 3MAIL ROOM STAFF

J. J. Young	8-13-46	Officer
J. J. Murphy	7-1-48	Sergeant
L. A. Graxiola	1-20-51	Officer
R. E. Boyd	4-1-63	Officer
R. D. McKinney	6-19-61	Male Clerk
Mrs. D. Taylor	10-6-47	Female Clerk
Mrs. M. Ingram	7-17-61	Female Clerk

Persons assigned to the mail room are trained on the job to be able to recognize contraband items (money, etc.) and written material that could lead to violence (e.g. attacks on staff, riots, etc.) in accordance with Penal Code section 2600. There is no steadfast rule with rule with respect to length of service before assignment to the mail room. We do not keep assignment records after three years, but mailroom supervisor Sergeant J. J. Murphy states that most of our mailroom personnel have been there for a considerable length of time -- at least four years or more.

INTERROGATORY NO. 4:

State whether any letters (or copies or summaries thereof) to or from plaintiffs Martinez and Earley are included in their respective institutional files. If so, state in addition the following:

- (a) the date of each such letter;
- (b) the sender and the addressee of each such letter;
- (c) the reason or reasons for placing each such letter in plaintiffs' file.

ANSWER TO INTERROGATORY NO. 4:

Nothing in inmate Earley's file indicates that any letters to or from him were placed in his institutional file as constituting improper correspondence.

INTERROGATORY NO. 5:

State whether defendants maintain, require to be maintained or are aware of any file, note, log or other record disclosing the fact that prisoner letters deemed improper by institutional personnel have been

rejected for mailing. If so, describe each such file, note, log or other record and its location in a manner suitable for use in a subpoena.

ANSWER TO INTERROGATORY NO. 5:

No such records are maintained. Letters rejected for mailing are returned to sender.

INTERROGATORY NO. 6:

State whether defendants are aware of any instances where any institutional head has refused (for any reason other than the inmate's lack of funds) to permit any inmate to send registered or certified mail, or any communication requesting a return receipt. If so, state in addition the name of the inmate involved and the reason or reasons for each such refusal.

ANSWER TO INTERROGATORY NO. 6:

I can recall no such instances since initiation of new institutional mail order (attached).

INTERROGATORY NO. 7:

State whether defendants have ever, while serving in their present capacities, permitted visits to inmates by attorneys' assistants who are neither members of the Bar nor investigators licensed by the State of California. If so, state in addition the following:

(a) during what period of time such visits were permitted;

(b) specific details, including dates and names of all persons involved, of any incident involving visits by such unlicensed assistants to attorneys that defendants deem to have created any danger to prison security.

ANSWER TO INTERROGATORY NO. 7

Visits to inmates by law students are permitted in accordance with San Quentin Institutional Order 403-A (attached) and also by court order. A photocopy of Plaintiff Earley's special purpose visiting card is attached.

INTERROGATORY NO. 8:

State whether defendants presently permit law students to visit prisoners in any circumstances. If so, state in addition: (a) in what circumstances, (b) subject to what conditions, and (c) what inquiry, if any, is made of such students' qualifications, background, character and security clearance.

ANSWER TO INTERROGATORY NO. 8:

All students must abide by institution order No. 403-A (attached).

DATED:

LOUIS S. NELSON
Defendant

Subscribed and sworn to before me
this 26th day of October, 1972

Notary Public

THOMAS A. BRADY
Attorney for Defendant Nelson

CALIFORNIA STATE PRISON
SAN QUENTIN

INSTITUTION ORDER NO. 403-A

SUBJECT: LAW SCHOOL STUDENT ASSISTANCE TO
INMATES

I. OBJECTIVES OF COOPERATION WITH SCHOOLS OF
LAW

- A. To provide legal assistance to the maximum number of indigent inmates.
- B. To broaden the experience of law students.

II. IMPLEMENTATION OF STUDENT LEGAL ASSISTANCE
PROGRAMS

- A. The administrative head of the law school will submit a written application indicating the nature of the proposed program and that it is an officially endorsed program of the school. Upon being furnished with a copy of this institution order, the administrative head will indicate in writing the school's agreement to adhere to the guidelines contained herein.
- B. The San Quentin Administration reserves the right to reject, remove or suspend a student from participating in the program for inability to function in a mature manner, for violation of institutional rules or for becoming personally involved with inmates in matters unrelated to their legal problems.

III. GUIDELINES FOR PARTICIPATING LAW STUDENTS

- A. The law school will designate a faculty member, preferably the dean or a department head, as having overall responsibility for the student program. The school may wish to designate a senior student as student director or coordinator of the program.
- B. The law school will be fully responsible for the professional ethics and appropriateness of the students

legal activities. In addition to technical instruction and supervision, the school will instruct students as to their overall responsibilities and conduct. Students selected for the program must be mature and able to maintain professional objectivity.

- C. The law schools participating in projects at San Quentin should maintain records of inmates counseled and coordinate their activities so that a particular inmate is not being counseled simultaneously or successively by several students. Duplication of effort means that fewer men can receive legal guidance.
- D. Men under sentence of death or facing prosecution for serious crimes will not be counseled by students.
- E. Men who have attorneys active in their cases will not be counseled by students unless written permission is obtained from the attorney.

IV. GUIDELINES FOR LAW STUDENTS

A. Visiting Information

- 1. Law students may interview clients from 9:00 A.M. to 3:00 P.M., Monday through Friday. Students must arrive prior to 2:00 P.M. for visits to be initiated. No interviews will be scheduled on weekends or holidays.
- 2. Men on isolation or administrative segregation status are not available between 11:00 A.M. and 1:00 P.M.
- 3. Visits will be limited to one hour when the visiting room is crowded.
- 4. Students will not wear blue or black jeans which might be confused with inmate clothing.
- 5. The Visiting Room Officer will approve interviews if the student has the following items:

C. Consultation with Staff

1. Students will not be permitted access to inmate central files. Non-confidential materials in the records can be discussed with staff members upon request.

L. S. NELSON,
Warden.

LSN:JWLP:ajr

SQ10 #403-A 4-14-71

San Quentin State Prison Warden's Rules

Chapter II. Article 4 MAIL

Q2402. GENERAL MAIL PROVISIONS: The following are in addition to the Director's rules regarding mail.

1. You may correspond with relatives, friends, bona fide business contacts, courts, attorneys and public officials. All mail to/from courts, public officials and attorneys will be recorded. Other mail may be recorded as circumstances warrant.
2. Incoming letters may contain a reasonable number of enclosures such as newspaper clippings, religious pamphlets and unframed photographs. You may receive a total of 15 embossed U. S. Post Office envelopes and 10 U. S. Postal Cards each month. Funds for your trust account may be sent by money order or certified check only. Nothing else may be mailed in without prior permission. Items received without a permit will be returned to the sender at your expense. C.O.D. packages cannot be accepted. Permission to buy or receive items not listed here will be in accordance with San Quentin Institution Order #408.
3. Magazine and newspaper subscriptions and paperback books may be ordered for you by your correspondents in addition to orders you may submit in accordance with San Quentin Institution Order #408. These must come directly from the publisher only.
4. All incoming and outgoing letters, enclosures and publications must conform to Penal Code Sections 311, 313 and 2600 as well as to applicable Federal Postal regulations. Material that is obscene, incites to violence or that jeopardizes institution security will not be permitted.
5. You may not place advertisements in any publication or send coupons for free offers, book clubs, etc.

6. If correspondents indicate that they do not wish to hear from you, you must stop writing them or be subject to disciplinary action.
7. Correspondence between prisoners will be approved only as follows:
 - A. Where the prisoners are close relatives.
 - B. For legal purposes only where crime partners are appealing their conviction.
8. Either the CDC-116, inmate stationery, or lined tablet paper purchased at the canteen may be used. Letters, other than to attorneys, courts or officials, are limited to two pages, written on both sides, for canteen tablet paper only.

Revised - March 25, 1971

EVELLE J. YOUNGER, Attorney General
 of the State of California
 EDWARD J. HINZ, JR., Chief Assistant
 Attorney General--Criminal Division
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Original filed
 Oct. 27, 1972
 Clerk, U.S. Dist.
 Court,
 San Francisco

Attorneys for Defendants

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
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)	
Plaintiffs,)	
)	
vs.)	No. C-71 543 ACW
)	(Three-Judge Court)
RAYMOND K. PROCUNIER,)	
et al.,)	
)	
Defendants.)	
)	

ANSWERS OF DEFENDANT LOUIS S. NELSON
 TO REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NUMBER 3:

Letters found objectionable by the
 mailroom staff may be rejected for mailing
 for any of the reasons listed in Exhibit A
 to the amended complaint filed herein.

ANSWER TO REQUEST FOR ADMISSION NUMBER 3:

Checklist (Exhibit A) is not used
 at San Quentin Prison. Many of the items
 specified on this form do not constitute

reason for rejection at this institution.

REQUEST FOR ADMISSION NUMBER 4:

Letters found objectionable by mail-room staff may also be rejected for mailing for other reasons as deemed appropriate by institutional personnel, and such reasons may then be noted in the blank spaces on Exhibit A to the amended complaint.

ANSWER TO REQUEST FOR ADMISSION NUMBER 4:

I am aware of no reasons for rejection at this institution which are not stated on the form.

REQUEST FOR ADMISSION NO. 28:

The newspaper article attached as Exhibit F to the amended complaint accurately states that a San Quentin inmate was charged in a disciplinary proceeding with violation of Director's Rule 1201, possessing and writing militant material, a letter.

ANSWER TO REQUEST FOR ADMISSION NO. 28

A San Quentin inmate was charged in a disciplinary proceeding with violation of Director's Rule D-1201, possessing a writing of militant material.

LOUIS S. NELSON
Defendant

Subscribed and sworn to before me
this 27 day of October, 1972

Notary Public

THOMAS A. BRADY
Attorney for Defendant Nelson

EVELLE J. YOUNGER, Attorney General
 EDWARD A. HINZ, JR., Chief Assistant
 Attorney General--Criminal Division
 DORIS H. MAIER, Assistant Attorney
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filed Nov.1, 1972
 Charles J. Ulfers,
 Clerk

Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
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Plaintiffs,)	No. C-71 543 ACW
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RAYMOND K. PROCUNIER,)	<u>FOR ADMISSIONS</u>
et al.,)	
)	
Defendants.)	
)	

Defendant R. K. Procunier hereby answers with respect to plaintiffs' request for admissions in the above-entitled case, which request was served on counsel for defendants on September 13, 1972, and states as follows:

Item 12:

Item 12 is not true. All prisoner letters to attorneys are routinely processed by the mail room as legal mail if they are so designated by the inmate. Such letters may be, but are not necessarily examined for content.

Item 13:

Item 13 is not true. All letters from attorneys to prisoners are routinely processed by the mail room as legal mail if they are so designated by the attorney or if written on letterhead stationery. Such letters may be, but are not necessarily examined for content.

Item 19:

Based upon information from the custodian of the inmate record, the department has no record of the request for interview.

Item 20:

Item 20 is true.

Item 21:

Based upon statements made to me by institution heads, item 21 is true.

Item 23:

Based upon information from the custodian of the inmate record, the department has no record of the request for correspondence.

Item 24:

Genuineness of the attached as Exhibit B is admitted. It should be noted that no action was taken concerning this incident.

Item 25:

Genuineness of the letter is admitted.

Item 26:

Genuineness of the letter is admitted.

Item 27:

Genuineness of the letter is admitted.

Item 29:

Genuineness of the attached as Exhibit L is admitted.

Based upon information from the custodian of the inmate record, the department has no record with which to ascertain the genuineness of Exhibits H and J.

Dated: October 27, 1972.

R. K. PROCUNIER
Director of Corrections

THOMAS A. BRADY
Deputy Attorney General

Deposition of
RAYMOND K. PROCUNIER
November 16, 1972

BE IT REMEMBERED that, pursuant to notice of taking deposition, on Thursday, the 16th day of November, 1972, commencing at the hour of 1:35 p.m., at the offices of the Department of Corrections of the State of California, 714 P Street, Sacramento, California, before me, Richard C. Bradford, a Notary Public in and for the County of Sacramento, State of California, personally appeared

RAYMOND K. PROCUNIER,
called as a witness by the Plaintiffs herein, who, being by me first duly sworn, was examined and interrogated as hereinafter set forth.

--oOo--

RAYMOND K. PROCUNIER,
called as a witness by the Plaintiffs, being first duly sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

Q (By Mr. Turner) Mr. Procunier, you are presently the Director of the California Department of Corrections?

A Yes.

Q Broadly, what are your duties as director?

A I'm responsible to the Governor for the safe-keeping and programming of about 20,000 inmates inside institutions, about 21,000 parolees, all who have been to State

Prison, and/or through civil narcotic program, and general administrator of all the institutions, direct supervisor of the deputy directors and wardens superintendent, and provide all the supervision for that organization.

Q Do you from time to time issue director's rules on matters of institutional policy?

A Yes.

Q I show you a copy of a document that has been marked Plaintiffs' Exhibit 1 and direct your attention to the first paragraph under article 4, which is entitled "Policy regarding mail." Is that policy still in effect?

A Yes.

Q I notice at the bottom of the document it bears a date January 5, 1970, but the policy that is set forth there has not been changed, is that correct?

A Right.

Q Under rule 2401 on that same page, where the mail privilege is discussed, is that provision still in effect?

A Yes.

Q Are your mail regulations based on that premise?

A Yes.

Q Mr. Procunier, do you recall answering requests for admissions in this case?

MR. BRADY: I worked with Mr. Hull basically on that, but he did sign.

Q (By Mr. Turner) I think this will refresh your recollection.

A Yes, I remember that.

Q Now, according to request for admission number 2, which inquired about outgoing

letters being read by mail room staff in the institutions, your response was that the statement would be true "if amended to the effect that the prisoners' letters may be read, and that mail room staff or other employees as designated by the warden may inspect the letters." I just want to be sure what was meant by that. Do you mean that mail room staff are authorized to read letters but may not necessarily do so?

A No, that was not exactly what I was trying to get across.

MR. BRADY: Do you have copies of these?

MR. TURNER: We are talking about number 2.

THE WITNESS: What was the question, what was I trying to say there?

Q (By Mr. Turner) Yes. I was trying to find out why your response to that letter was qualified.

A The reason it is qualified is that essentially, since we have such a varied inmate population, and since we have such varied institutions in terms of control and security and all the related things; for example, the one extreme would be men's freedom in camp as opposed to the Folsom Adjustment Center. I was just trying to point out in each one of these cases that the rules will be different, and I want them to be different, and I want them to be specifically related to the problem involved with the individual, if there is one.

Q In other words, in some institutions, all of the mail may be read, and in others, not all of the mail?

A Right. Within one institution, all of it may be read for one man or a group of men. The other end of the continuum -- depending upon what we consider to be the needs of the institution security and the needs of the man.

Q Your answer also indicates that mail can be read by employees other than mail room staff, is that correct?

A Correct. The reason for that is some institutions are organized where all the censoring and reading is done in the mail room, and other institutions are organized such that it is read by a first watch or third watch personnel, depending on the specific organization and the peculiarities of each institution.

Q Mr. Procunier, I show you a document which has been marked Plaintiffs' Exhibit 1 to the deposition of Sergeant Miranda at Folsom Prison that we took this morning, which appears to be a mail room form that is used at Folsom Prison, and was apparently put into use this year. Do you review forms of that nature when they are promulgated by the institution?

A I review their policy. Not necessarily all their forms, no.

Q The form, Exhibit 1 there, lists a number of reasons for rejecting mail and not permitting it to go out of the institution.

Are those permissible reasons under your director's rules for rejecting letters?

A They're not numbered, but I'll take them one at a time. The first one is, second one is, third one is, fourth one is, fifth one, okay, sixth one, okay, seven, okay, eight, okay, nine, okay, ten, okay, eleven, okay, twelve, okay. Wherever number I am, okay, next one, okay, next one is blank.

Now, under the bold heading down below --

Q Well, I am not concerned about that. The officer this morning testified that at Folsom when he considers a letter to be rejected for a reason that is not listed specifically, that they will fill in the blank; is that your understanding?

A Right. That's okay, too.

Q I show you a slip that has been marked Plaintiffs' Exhibit 2, which we obtained from a prisoner at San Quentin. Do you know whether that form is used at San Quentin Prison?

A No.

Q Do you know that it is not?

A No.

Q Would the reasons that are stated on that form be permissible reasons under your director's rules for rejecting letters?

A Yes.

--oOo--

Q All right. Mr. Procunier, I show you a document which has been marked Plaintiffs' Exhibit 4. It is also marked Exhibit B to an affidavit. I am just referring to the yellow slip that has been marked. That was sent to us by a prisoner at Vacaville. Do you know whether that form was and is being used at Vacaville; A No.

Q Do you know that it is not?

A No.

Q On the check list, there is offensive or obscene remarks or material. Would that be a permissible reason under your director's rules for rejecting a letter?

A Yes.

--oOo--

Q How long have you been director in the system?

A A little over five years.

Q During that time, I take it there has been control of social correspondence?

A You mean by social correspondence what I consider just average regular correspondence with family and friends?

Q Yes.

A Yes, in some form or another, it has been.

Q Have there been any experiments with uncensored correspondence? A Yes.

Q Could you describe what those have been?

A We have had various ones, but probably the most typical one would be at CRC, California Rehabilitation Center, at Corona, where we have people under the civil narcotics control program, and for some time

now, they haven't had, for the regular population, any mail lists or censorship either way, and we've experimented with it at other places.

Q When you say you haven't had censorship either way, you mean incoming and outgoing mail?

A Right.

Q The letters are not actually read?

A Except in specific cases. The general rule down there is that a person can correspond with whom he desires, he or she desires.

--oOo--

Q Are you presently considering any revisions of the rules on mail?

A Yes, we're in the process of that now.

Q Do you think that the rules should be revised?

MR. BRADY: Well, once again, we're getting into an opinion here, and we object to that.

Q (By Mr. Turner) Do you agree with us that the present rules or the old rules are unconstitutional?

MR. BRADY: Same Objection.

MR. TURNER: State the ground of the objection.

MR. BRADY: As calling first for an opinion on the part of the witness. Also, a legal opinion, ultimate legal opinion, really, of course, of an expert.

Q (By Mr. Turner) In your capacity as director, do you believe that the old or

present rules governing mail are bad correctional policy? A No.

Q Could you describe what revisions you have under consideration?

MR. BRADY: I think you better narrow that. It's not an objection, but just narrow --

Q (By Mr. Turner) In what respect are you considering revisions of the rules regarding mail?

A That's almost the same exact question.

Q Well, referring specifically then to director's rule 2402, are you considering any changes to that rule?

MR. BRADY: It might be better if we worked off the older rules to make it easier. Just refer to them by number.

THE WITNESS: We are talking about now only the director's rules , changes?

Q (By Mr. Turner) Right.

A The answer to your question is yes.

Q What revisions are being considered?

A I'm contemplating revisions in the director's policy rules regarding mailing so they will be more flexible, so it can include all of the institutions. However, that rule may still well be in effect in some of the institutions in the department on an institutional basis rather than a departmental basis.

Q What about director's rule 1201 regarding magnifying grievances?

A That is under inmate behavior. Excuse me, 1201?

Q Yes.

A Again, the departmental level, the answer to your question is yes, I am contemplating that rule, but again, it may end up in a -- it may end up as an institutional rule in some institutions.

Q In other words, what you are contemplating is giving the institutions the power to promulgate rules which are like these, but they are not required to --

A My approval. Can I describe the process here? Would it be appropriate?

Q Yes, Please do.

A I am going to change, basically change the over-all rules of the department so they provide for more flexibility throughout the department, and also approve the specific rules and regulations for every institution, as has been the practice in the past. So I want to be careful when I answer yes or no to these to be sure we understand that we are only talking about the director's rules, and I haven't got any idea yet what each institutional rule we will look at until I have had a chance to review and either disapprove them or approve them.

Q Is it correct to say that you are not considering a change in the rules that would prohibit the institution from having rules like these two that we have just referred to?

A The possibility of having those rules -- I am not changing the policy of the department to the extent that it would

prohibit institutions from recommending that type of a rule.

Let me give you an example. I think you will get to the point I am talking about. That is the rule that comes the closest in the newest contemplated rule, and I am not certain this is the way they will end up. For example, you must -- instead of 1201 and this combined with several other ones, the new rule that is contemplated may read, "You must not make remarks or noises which are insulting or show disrespect to others."

Q Referring to director's rule 1205, definging contraband, and including the definition of contraband, any writings expressing inflammatory political, racial and so on, views or beliefs; is there any change contemplated in that rule?

A Yes.

Q In what respect would you be changing that rule?

A The plan now in the rough draft that is under consideration by my staff and ultimately for my decision is to consider that contraband is the use of rather than the material of it as being contraband and where it would be kept in the institution.

Let me give you an example. Rather than stating it the way it is stated -- which one are we talking about under the old rule?

Q 1205, in particular sub parts D and F.

A To give you the general thrust, instead of stating it that way, we are

contemplating they must not possess or assist in circulation of any writings or voice recordings in any form, or violating any form of behavior constituting escape plans or plans of production and requisition of weapons -- the warden may order that inmates be issued property to which the inmate will have access under supervision.

The basic thrust here is that rather than to determine contraband and destroy it or take it away, we are going to take a look at it differently in terms of the possible use of it, and if we feel that it could be used for the purpose of, as I have described earlier, then we would put it in the inmate's property, but not confiscate it, and give him access to it under certain local conditions.

Q You have agreed in response to our request that under the present rule, letters may constitute contraband. Would that be changed under the revised rule?

A Not necessarily, if they feel it was within the parameters of what I just described to you. The way we would handle them would be they would be handled differently.

Q I take it that with regard to any revisions that you make, that you are reserving the right to go back to the old regulations or different regulations at any time, aren't you?

A With any regulations that I adopt, I am reserving the right to review them.

Q Well, if in your judgment any revised rule didn't work out the way you

thought it should, I take it you are reserving the right to go back to what is now the present rule, aren't you?

A If we find that any rule or regulation is not serving the purpose for which it is intended, I reserve the right to modify it.

Q When a letter is rejected for mailing now in the mail rooms at various institutions, what recourse does a prisoner have if he thinks he has a right to send a letter out?

A He has several. I'll go through them in chronological sequence. To appeal it to the mail sergeant or his equal, and then through the hierarchy, to the warden, and if this is not satisfactory, he can write me a sealed letter, or can appeal it to me directly without being sealed. If he's not satisfied with that, this would be looked into and a decision made. If he's not satisfied with that, he can get this reviewed by any elected official in California by writing them a sealed letter.

Q Is there any director's rule that spells out specifically what procedure the prisoner is supposed to follow?

A For appeals?

Q When a letter is rejected.

A I don't think so. This falls under the general category of -- well known to inmates and all staff, not restricted to mail appeals from mail decisions, but from any decision, well known in the department, that they can appeal decisions to the director by virtue of the rule that stipulates they can write a sealed letter to the

director. It implies this, if not specifically states it.

Q You say it is well known to the inmates. Is it well known -- do you think that their first level of appeal goes to the mail room sergeant himself?

A I would say yes. More accurately, in my experience, I feel this is well known.

Q In many, if not most cases, isn't it the mail room sergeant himself who rejected the letter?

A No.

Q Who would it be if not the mail room sergeant?

A Mail room employee, or an officer or person responsible for reading it, which may or may not be related to the mail sergeant.

Q You mean it could be a clerk in the mail room?

A Yes, in some cases.

Q Mr. Procunier, Mr. Brady kindly let us look through the central file of the two individual prisoners who brought this lawsuit, and in the file of Robert Martinez, one of the plaintiffs, we found a copy of this letter and envelope which have been marked together as Plaintiffs' Exhibit 5. I would like you to take a minute to examine the letter and tell me if there is any reason why such a letter should be put in a particular prisoner's file.

A Would you repeat the question?

Q I am just wondering whether from your point of view as director there is any reason why such a letter should be included in the inmate's central file?

A Where was this mailed from, from what insitution?

Q Whatever institution -- it was at Crestline.

A At Crestline, no.

Q Is it correct that the inmate's central file is available to the Adult Authority at the time of parole review?

A Yes.

Q In this letter that has been marked Plaintiffs' Exhibit 5, the inmate talks about his commitment to Laraza. Do you think that might have had anything to do with retention of the letter?

A I can't answer that.

MR. BRADY: Once again, you are asking for an opinion.

Q (By Mr. Turner) Mr. Procunier, I show you a copy of another letter from the same inmate's file that has been marked Plaintiffs' Exhibit 6, which appears to be a letter to a federal judge. Is there any reason why such a letter as that should be included in the central file?

A What was the question again?

Q Can you think of any reason why such a letter as that should be included in an inmate's central file?

A No.

Q What is the policy when a letter should be copied and placed in a central file?

A It's up to the judgment of the administrator in the insitution.

Q Would that include the mail room sergeant?

A Yes, he could initiate it. I'm not certain that any are placed in there on his decision alone, but he could well be the one that initiated it.

Q Is there any director's rule that specifies when a letter should be included in the prisoner's file?

A No.

Q It is pretty much up to the institution?

A Yes.

--oOo--

Q Does the Department of Corrections have any law student legal assistant programs in operation now?

A Yes.

Q What institutions?

A They come and go from time to time, so I'll tell you my last facts were at Vacaville, Soledad and Chino, CIM, CIW, Women's Institution. We had several law students working with us this summer throughout the department, too, working on headquarters staff, and there are others, but I can give you a list if you want.

Q Isn't there a program at Folsom?

A Yes.

Q And one at San Quentin?

A Yes. But I want to be sure and give you exactly what -- I understand they come and go, and I don't know whether it's between semesters.

Q Do you have any rough idea of how many students might be involved in all these programs?

A No. It would be too rough an idea, but I can get you that.

Q What are the purposes of that?

A One purpose is to provide training for the students, and the other is to provide legal counsel for inmates that have a question, whether they need it or not, and haven't got an attorney. The other reason, and one of the biggest purposes, is to help establish a better relationship between the lawyers and law schools and our department than we previously had.

Q Does the department make any inquiry into the qualifications or background of the students who participate?

A If you mean by that to decide whether or not they are bona fide students, yes.

Q Do they make any inquiry at all?

A I'm not certain. We ask that -- we are assured by the school, and we make certain that the schools assure us that they are students, if you call that an inquiry, yes.

Q In other words, you take the school's word for it, that they are students, and you don't look beyond that?

A No, the department doesn't go beyond that.

Q You don't make any security check of any kind on the students?

A Not as a routine practice, no.

Q Under your mail and visiting manual, prisoners can receive visits from their attorneys of record or designated representatives, but the representatives have to be either

members of the bar or licensed investigators; has that always been the rule? A No.

Q When was that changed?

A I was going to say it was in August, or late August, early September, 1971.

Q And before that time, were prisoners permitted to receive visits from unlicensed investigators?

A Yes.

Q Were there any incidents while that older rule was in effect that involved unlicensed investigators that you think posed any threat to prison security?

A Yes.

Q What were they?

A I don't recall specifically.

Q Do you recall what institutions they were in?

A No, not specifically. I'd have to go back and do a lot of -- but the general question -- the answer to it is yes. That's why I changed it.

Q Well, we have asked for specifics as to any incidents that are involved in our interrogatories. I would like to have them spelled out in those answers, just what incidents were involved that you think posed any threats to security.

A I can tell you generally without being specific what caused the problem. The real threat to security was that we were having visits from any one attorney that designated some people that we chose not to have in our institutions. That was generally the cause we found, that with some firms,

they would designate anybody to be an investigator to get them in, people that we wouldn't allow in the institutions, so we tried to correct that and still be reasonable. The only way we could control it in my judgment would be to have them be licensed investigators.

---oOo---

Yes.

Now, were any incidents while that

other this was an incident that involved the

other the incident that involved the

was a prison security

Yes.

Q What were they?

A I don't recall specifically.

Q Do you recall what incidents they

were?

A No, not specifically. I'd have to

check and do a lot of -- but the general

idea is the answer to it is yes. That's

all I know.

Q Now, were there any incidents that

involved the prison security

that you mentioned for the prison

security that involved the prison

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Plaintiff's Ex #1

Director's Rules

Chapter II, Article 2

D2210. SALE OF HANDICRAFT ARTICLES.

Sale prices of handicraft articles may be established by the maker but within limits set by the handicraft manager. A percentage of the sale price (as determined by the Director) shall be credited to the Welfare Fund to help defray costs of handicraft operation and the balance deposited in the inmate's trust account.

Proceeds from the sale of handicraft articles made from state-owned materials must be deposited in the Inmate Welfare Fund.

ARTICLE 3. LIBRARY

POLICY REGARDING LIBRARIES

The reading of good literature and the study of technical books has a constructive influence by developing good reading and study habits, and by practice in the constructive use of leisure time. The Department has established in each institution a good library designed for educational, cultural, and recreational values.

D2301. LIBRARY PRIVILEGES. Use of the institutional libraries is a privilege which you may lose if you violate the regulations.

ARTICLE 4. MAIL

POLICY REGARDING MAIL

It is considered essential to the eventual resocialization of inmates that they maintain contact with their families and desirable friends through use of the mail privilege. Therefore, inmates are encouraged to make use of the mail privilege and every means compatible with security is provided for them to do so.

D2401. MAIL PRIVILEGE. The sending and receiving of mail is a privilege, not a right, and any violation of the rules

governing mail privileges either by you or by your correspondents may cause suspension of the mail privileges.

D2402. USE OF THE MAIL PRIVILEGES.

In addition to institution regulations the following provisions will apply to correspondence:

1. All your correspondence, packages, and personal property, sent or received, are subject to inspection and censorship. You shall not be permitted to send or receive a package or communication of any nature until you have signed the required form consenting to the opening of same and examination of its contents. No C.O.D. mail or

DR/5

January 5, 1970

PLF's Ex #2

Returned For Reasons Indicated _____
Get Approval Regular Channel _____
Name, Number Not In Proper Places _____
Not a Business Letter _____
Have Sender Put Name & Add. on Env. _____
Use "A" or "B" Before Your Number _____
Not Proper Correspondence Prison Gossip _____
Quota For The Week Exhausted _____
106 Sent Has Not Been Returned _____
No Mail Sent Out Until 106 Approved _____

Plaintiffs' Ex #3

Director's Rules

Chapter I, Article 1

CHAPTER I. INMATE RULES

ARTICLE 1. INMATE RESPONSIBILITY

NECESSITY FOR RULES

Rules are necessary in every community and institution to protect people's rights. The rules in this book are made by the Director of Corrections and may be changed by him, under provisions of Penal Code Section 5058. Every inmate is expected to obey these rules and regulations of the institution in which he lives.

D1101. RESPONSIBILITY OF INMATES.

All inmates, regardless of commitment circumstances, are subject to the Director's rules, the institutional regulations, and to all applicable laws. Read the rules and the institutional regulations and know what is expected of you. Provision will be made for each inmate to become familiar with the rules. Not knowing the rules is no excuse for violation.

ARTICLE 2. BEHAVIOR

POLICY REGARDING BEHAVIOR

The best control of behavior is self-discipline. This article describes expected behavior. Failure to comply with these rules will be cause for disciplinary action. If you should become a menace to yourself or others or to property or to the morale of the general population, you will be segregated from others. This might be for medical, psychiatric, disciplinary, or administrative reasons.

D1201. INMATE BEHAVIOR. Always conduct yourself in an orderly manner. Do not fight or take part in horseplay or physical encounters except as part of the regular athletic program. Do not agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence.

D1201. OBEYING ORDERS. Promptly and politely obey all orders or instructions given by employees or by others in charge of inmates.

D1203. SANITARY PRACTICES. Adopt habits and practices which assure acceptable personal hygiene and sanitary conditions. Place all refuse in containers provided.

D1204. OFFENSIVE LANGUAGE. Do not use profane or obscene language. Do not boo, whistle, shout or make other loud and disturbing noises. Do not make sarcastic or insulting remarks to or concerning others.

D1205. CONTRABAND. Anything not issued to you, sold to you through the Canteen, permitted by the rules, specifically authorized, or any property of another, or anything which is being misused is contraband and will be confiscated. Money you find on the grounds and voluntarily surrender may be

Deposition of
KENNETH WARREN MIRANDA

November 16, 1972

BE IT REMEMBERED that, pursuant to notice of taking deposition, on Thursday, the 16th day of November, 1972, commencing at the hour of 11:00 a.m., at the offices of the Department of Corrections of the State of California, 714 P Street, Sacramento, California, before me, Richard C. Bradford, a Notary Public in and for the County of Sacramento, State of California, personally appeared

KENNETH WARREN MIRANDA,

--oOo--

KENNETH WARREN MIRANDA,
called as a witness by the Plaintiffs,
being first duly sworn by the Notary Public
to tell the truth, the whole truth, and
nothing but the truth, testified as follows:

DIRECT EXAMINATION

Q (By Mr. Turner) Would you state your full name and address for the record, please sir.

A Kenneth Warren Miranda, 1220 School Street, Folsom, California.

--oOo--

Q And your present position is mail sergeant?

A Yes.

Q What are your duties as mail sergeant?

A Record mail, control mail, and I supervise the work of four female clerks.

Q What do they do?

A They record mail, search, censor mail, process the mail and applications.

--oOo--

Q Why don't you explain everything it is that you do when you record mail.

A Okay. Well, we'll start out -- we have the mail divided into two sections, or three sections; one and two is referred to as social and business mail, and the third section is referred to as legal mail. Now, we'll go to social mail. The social mail is just merely what it indices. In order for an inmate to correspond with anyone socially, he is required to submit a CDC form 105, mailing and visiting application. When or if approved, the party that he's submitted a request for is recorded on the front side of the mail record indicating the person's full name, his address and the relationship. This is one form of recording.

Now, the other form is a business mail, which requires the approval of the employee whose department that falls under. This is recorded on the back side of the mail record, which is referred to as a special purpose mail. We record who the mail -- or who the letter goes to, the address, and who has authorized that letter to be sent out.

Now, the third, which is legal mail; this is recorded on the back of the mail record, indicating who it is going to, the address.

Q Do you have a mail record for each prisoner?

A Yes.

Q Where is that kept?

A That's kept in the mail room.

Q How many prisoners do you have at Folsom now, about?

A 1,646.

--oOo--

Q What was this form used for?

A This form is used for returning inmate mail to them. This is to inform them why we're returning the mail, plus any mail that we may get in from outside source. The lower portion is to inform them what to do to correct whatever might be involved.

Q You say a different form is in use now?

A Yes. It's basically the same format with slight modification.

Q In other words, it's a kind of check list of reasons?

A Correct. We change it quite often. Since I've been there, I imagine we've changed that form maybe nine, ten times.

Q On Exhibit A, besides the listed reasons for returning letters, there also is a blank space with a box for checking next to it. Was your practice to fill in other reasons?

A Right. This was for any violation that may come out that wasn't covered by this, or to explain the reason why we would -- if it was kind of basically infringing on certain rights, then we would try to explain it in the inner portion here.

Q And the blank would also be filled in with reasons that are not listed in the form?

A Yes. This is what the lines are for, for the reasons that are not listed.

Q Is that also true on the new form?

A Yes.

Q You don't have a copy of your form with you today, do you?

A No. I believe I gave you a copy.

MR. BRADY: I think I have it.

Q (By Mr. Turner) Sergeant Miranda, I show you a form that has been marked Plaintiffs' Exhibit 1 and ask you whether that is the form that is presently being used at Folsom?

A That's correct, that's the one.

--oOo--

the only reason we make new forms -- to try to change them -- is to try to keep abreast of any changes that might be made.

Q Have there been any changes in the rules regarding mail in the last six months?

A Been a lot of them.

Q What are the major changes besides legal mail? Put aside legal mail for a moment.

MR. BRADY: Excuse me for interrupting. Is this in Folsom?

Q (By Mr. Turner) In the Folsom procedure.

A In the last six months, no, not counting legal.

Q You mentioned that you supervise the work of four female clerks who also re-

cord and control mail, is that correct?

A Correct.

Q Do they also read the mail?

A Correct. We're talking about what type now, legal?

Q Social mail.

A Social mail, yes.

Q What specific training are they given for that job?

A The training is actually on-the-job training given by me.

Q What is the specific training that you give them?

A First of all, they're instructed on how to use the card and what should or should not be recorded, what is required to be or be not approved, and how to process the mailing, individual applications.

Q What about the contents of letters; what are they instructed about that?

A They're instructed when they read something that they feel in their own mind might be something in conflict with the director's rules to refer it to me, and I make the determination on it; then the basic rejections are just set policy, which they can do automatically.

Q Do you yourself use the director's rules as a guide?

A Yes.

Q Under director's rule D2401 regarding mail privilege, our copy of the rules, which I'll show you, provide that the sending and receiving of mail is a privilege,

not a right, and any violation of the rules governing mail privileges either by you or by your correspondent may cause suspension of the mail privileges.

Is your control of the mail at Folsom based on that premise?

A Yes. Now, again, we're talking social mail?

Q Yes.

A And business mail, right?

--oOo--

Q What about defamatory; how do you determine whether a letter is defamatory?

A I would term that as defamatory if they were belittling staff or our judicial system or anything connected with Department of Corrections.

Q Under director's rule D1201, prisoners are prohibited from, among other things, magnifying grievances. Is that director's rule used also in controlling the mail?

A Yes.

Q How do you determine whether a prisoner is magnifying grievances?

A Usually if the prisoner is magnifying the grievance, he'll write out, and instead of just complaining about what has actually happened, he's got it to the point where he's belittling the staff because of their incompetency, or they would be belittling the staff because they failed to heed to his desires. This is the way I term magnifying it, calling it out of proportion.

Q That same rule, 1201, also prohibits undue complaining. How do you determine that?

Well, that's a hard one, because basically if we get a letter of that nature, whatever they're complaining about, or unduly complaining, we'll usually inform the head of that department, and then basically we just let it go.

Q Well, what if the prisoner makes what you feel are too many complaints; would that fall within that rule?

A It probably would, but I wouldn't say so, because, like I say, I don't basically view that one, because I've got the other one, unduly grievance.

Q You mean magnifying?

A Magnifying grievance. We get people where that's all they do is complain.

Q When a letter is rejected in your mail room, what recourse does the prisoner have if he thinks he has a right to send the letter?

A He can see the captain or the associate warden of custody or my supervisor, and I hold what we term as an open line. Once a week for one hour, I go inside, and I will discuss the problems with any inmate that wants to come in and talk to me.

Q Is there any director's rule that establishes any procedure for what a prisoner is supposed to do if he thinks that a letter has been unjustifiably rejected?

A Not to my knowledge, no.

Q Is there any institutional rule at Folsom that spells out any such procedure?

A No.

Q You mentioned a minute ago in answer to Mr. Brady's question that in some cases the contents of a letter may be severe enough to require disciplinary action, is that correct?

A Correct.

Q You mean the letter might give rise to CDC115 report?

A Correct.

Q And a disciplinary hearing?

A Correct.

--oOo--

Plaintiffs' Ex #1

FOLSOM STATE PRISON

Notice of Special Disposition - Inmate Mail

This Letter Is Returned for the Reason(s)
Checked Below:

☐ Not an approved correspondent. Submit CDC
105 if you desire to correspond. ☐ Hold
letter for approval of application.

☐ This party has been removed from your
approved list.

☐ Cannot go sealed; see Rule D-2404.

☐ Criticizing policy, rules or officials.

☐ Improper stationery. ☐ Limit, two (2)
sheets stationery.

☐ Write in English.

☐ Put your correct name and number in the
upper left envelope corner.

☐ Put your name, number and the relation-
ship of the person addressed on the under-
side of the flap.

☐ Needs official approval. See.....

☐ Not approved.

☐ Not considered a business letter.

☐ Mentioning inmates by name or number or
relating gossip or incidents.

☐ Use stamped envelopes to pay postage;
Withdrawal slips accepted only for legal
postage or postage in excess of \$1.00.

☐ Envelopes must not be folded, soiled or
otherwise damaged if used as postage pay-
ment.

☐ Free mail permitted only if completely
without funds.

☐ Your quota of free mail for this month
is exhausted.

☐ Hobby cards must be approved by Handicraft
Manager.

☐ Use government stamped embossed envelopes
for mailing letters.

☐ Letter is overweight; send.....
Stamped envelopes with letter for extra post-
age. ☐ Cannot certify or register without
funds.

☐ Legal mail or job requests may be paid
for with government embossed envelopes or
withdrawal slip (submit withdrawal slip even
if completely without funds). All legal
mail or job offers will be mailed.

- Cannot request samples or free literature.
-
-
-

This Letter Is Being Delivered to You, But the Following Special Instructions Must Be Followed or Future Mail May Be Returned.

— Not an approved correspondent. You may answer this letter. If you wish this person considered for placement on your mail list, submit a CDC 105, Mail and Visiting Application, form.

— Notify this party to place his name and return address on the envelope.

— Excessive powder or lipstick smears.

— Money Orders must be made payable to Department of Corrections.

— Stamps, embossed envelopes, hardbound cards or articles of any kind are not permitted without prior approval.

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-
-FSP 1027 REV 8/72 20M

Deposition of
HUEL DEAN MORPHIS:
November 16, 1972

BE IT REMEMBERED that, pursuant to notice of taking deposition, on Thursday, the 16th day of November, 1972, commencing at the hour of 2:55 p.m., at the offices of the Department of Corrections of the State of California, 714 P Street, Sacramento, California, before me, Richard C. Bradford, a Notary Public in and for the County of Sacramento, State of California, personally appeared

HUEL DEAN MORPHIS,

--oOo--

Q (By Mr. Turner) Mr. Morphis, would you state your full name and address for the record, please?

A Huel, H-u-e-l, Dean, D-e-a-n, Morphis, M-o-r-p-h-i-s, Post Office Box 75, Represa, R-e-p-r-e-s-a, California.

Q Are you presently employed by the California Department of Corrections?

A Yes.

Q In what capacity?

A Program administrator, Folsom State Prison.

Q How long have you had that position?

A A little over three years.

Q When did you first start with the department?

A April 14, 1956.

Q What was your job then?

A Correctional officer.

Q You worked your way up through the ranks to your present position? A Yes.

Q As program administrator, do your duties include anything to do with mail and correspondence?

A Yes, to a degree.

Q What do you actually do?

A I happen to be in charge of a particular unit that houses inmates, and, therefore, am responsible for the mail, incoming, outgoing.

Q What unit is that?

A The Adjustment Center at Folsom.

Q Is that one of the units at Folsom where all of the mail, incoming and outgoing, is read?

A Yes.

Q Do you read the mail yourself?

A No, not ordinarily.

Q Who does?

A The correctional officers.

Q In what cases do you read the mail yourself?

A Only the ones that would be referred up on a question, or appear to be not proper in content.

Q Mr. Morphis, I show you a copy of a letter which purports to be written to you, dated December 6, 1971, which is attached as Exhibit C to the amended complaint in this lawsuit, and I would like to direct your attention in particular to the first sentence of the third paragraph where you say that the regulations do not permit inmates to write

material that is discriminatory or derogatory toward individuals or races. Is that your understanding of the department's policy?

A Yes.

Q In referring to departmental and institutional regulations, were you referring to the director's rules?

A I don't recall.

Q Well, is there anything else that you could have been referring to?

A We have institutional regulations.

Q At Folsom? A Yes.

Q I have never seen a copy of it, but do you recall whether they prohibit matter which is discriminatory or derogatory?

A Well, I happened to revise them, but I can't quote them for you in their entirety.

Q In your understanding, would any director's rule cover this statement that you made in the letter?

A I don't happen to have a copy in front of me. I don't have those memorized, either.

Q Mr. Morphis, you say that you don't have the rules memorized, and certainly nobody would expect you to, but do you actually refer to the director's rules when you are reviewing prisoner mail?

A Ordinarily I use the Folsom directives.

Q Do you actually refer to them in reviewing mail?

A Yes, as I don't recall what they particularly cover, I do.

Q What is the Folsom rule called? What is it, Folsom institutional rules, or what is

the title of the rules you use at Folsom?

A It's a mail regulation published by the warden.

Q Mr. Morphis, I show you a copy of a letter that has been marked Plaintiffs' Exhibit 1, and it is a letter dated July 16, 1972, a prisoner named Clarence Morgan, and it has on it a notation "Not approved for mailing, H. Morphis"; is that your handwriting?

A Yes.

Q Do you recall not approving that letter?

A Yes.

Q Why did you reject that letter?

A Because of the content.

Q Do you recall anything in particular in its contents that is objectionable?

A Well, basically in referring to the different employees at the institution and making allegations and stating mistruths and so forth.

Q What in there in particular is mistruth in your judgment?

A Well, about half of it.

Q Mr. Morphis, I show you a piece of paper that has been marked Plaintiffs' Exhibit 2 addressed to someone named Morgan and signed H. Morphis. Did you write that note?

A Yes.

Q Is that the same prisoner who wrote this letter that we referred to before, Plaintiffs' Exhibit 1?

A Yes.

Q In the note you state that his letter contains too many disrespectful comments and

misrepresenting a fact. Is it your understanding that the rules don't allow disrespectful comments and misrepresenting of the facts?

A Well, there's a particular director's rule concerning at that time magnifying grievances, which is what he was doing in that regard. He would complain or unduly complain or magnify grievances, and I happen to know the circumstances and the facts and the comments that he was making, things that he was referring to, that just simply weren't true.

Q I now show you a document that has been marked Plaintiffs' Exhibit 3, which appears to be a letter from a prisoner named Charles Kellum, and it also bears notation "Not approved for mailing, H. Morphis"; is that your handwriting? A Yes.

Q Did you reject that letter?

A Yes.

Q Why is that?

A Must have been because of content.

Q Is there anything in particular in the content of that letter that you think is objectionable?

A Basically the same thing, a small section of it here concerning magnifying a situation, making complaints and derogatory remarks, comments.

Q Have you had a chance to look over the whole letter now?

A Yes. Basically in this area in here.

Q Which page is that, the second page of the letter?

A Yes.

Q I am going to show you a copy of a letter that has been marked Plaintiffs' Exhibit 4, apparently written by a prisoner named Richardo Ruiz, and also bears a notation "Not approved for mailing, H. Morphis"; did you reject that letter, also?

A Yes.

Q Do you recall why you did so?

A As I recall, it was concerning -- he was writing out erroneous information concerning a particular program at another institution and simply quoting erroneous facts as published in various papers accusing that he was going to be operated on and turned into a vegetable and so forth, which had no bearing on the particular type of program that he was being asked to go through. In fact, I think in my note to him it is stated as such.

Q I now show you a note that has been marked Plaintiffs' Exhibit 5, apparently a note written by you to Ruiz; is that the note you are referring to?

A Yes.

Q In which you state that he is not allowed to pass out misinformation, even if it is a quote from the newspaper, is that correct?

A Yes.

Q I show you a copy of a letter dated May 11, 1972, written from a prisoner, named Kelly, which has been marked Plaintiffs' Exhibit No. 6, and bears a notation "Not approved for mailing, H. Morphis"; did you reject that letter?

A Yes.

Q The first part of the letter is marked okay. Is that your notation?

A Yes, I believe it is.

Q The second part of the letter bears the notation "has something to do with the war in Viet Nam". Do you recall why that letter was rejected?

A No, it's not very legible. I'm not sure I can make it out. There's enough of it that I can't make out -- I'm not sure. I couldn't tell you.

Q Would the reference to the Viet Nam War have anything to do with it?

A No, definitely not.

Q You think it must have been something else in that paragraph?

A Yes. It would have been his comments concerning something that he was involved in. I would assume.

Q Turning to the question of incoming letters as opposed to outgoing letters, do the same standards in reviewing the contents of the letters apply?

A To a degree, yes.

Q For example, might you reject an incoming letter on the grounds that it contains prison gossip?

A Yes. Before we leave this, can I ask a question?

Q You want to do this on the record?

A Sure, I don't mind. Well, I don't know.

MR. BRADY: I don't know what your question is.

MR. TURNER: Why don't we go off the record.

(Short discussion off the record.)

Q (By Mr. Turner) Mr. Morphis, I show you a copy of a letter apparently written by you and dated September 28, 1972. It has been marked Plaintiffs' Exhibit 7. Did you write that letter? A Yes.

Q I also show you a copy of a letter dated September 26, 1972, that has been marked Plaintiffs' Exhibit 8. Is that the letter that you referred to as being rejected?

A Yes.

Q When a letter that a prisoner wants to send out is rejected by you, what recourse, if any, does he have if he thinks he has a right to send the letter out?

A He has an appeal with the associate warden in custody. He can make a formal written appeal stating the facts as he sees them, no special format, just on a memo piece of paper, and asking that it be checked into, and that the associate make a decision on the matter.

Q Is there any director's rules that spell out that procedure?

A Well, for some time through the director's guidance, and I don't recall whether it's worded in the ruling, he's been recently revising all the rules, but through his direction, we are to have an appeal for the inmates concerning the disciplinary process and the mail process concerning any grievances, and this pertained then to the assoc-

iate warden of custody who is in charge of that. He was the first line of appeal, so this is by regulation direction, yes.

Q As I understand it, the appeal procedure that you are describing isn't just for mail, it is for whatever kind of grievance?

A Anything. Disciplinary they feel was unjust or any type of dealings that was unjust.

Q Turning now to the question of registered or certified mail, what is the procedure that an inmate at Folsom goes through in order to send out a registered or certified letter?

A Well, he simply indicates that he wishes to send this out in that regard and attaches a trust withdrawal slip so that he can pay for it, pay for the cost of it.

Q Is there any approval required?

A Well, the regulation simply states that any inmate may send registered or certified mail providing he has the funds to pay for it.

Q What regulations are you referring to?

A Folsom regulations.

Q Is that what is actually done in practice?

A To my knowledge, as far as I know.
MR. TURNER: I have no further questions.

CROSS-EXAMINATION

Q (By Mr. Brady) I just wanted to clarify your exact job at Folsom. Once again, you say you are program administrator,

so that your duties would be what, now?

A My particular duties are in charge of the Adjustment Center. I have other duties, also. This is my primary function.

Q You are subject in that, of course, to the warden, and who else in between?

A Well, I'm subject to the associate warden in custody, my immediate supervisor.

Q And ultimately to the warden?

A Yes.

Q Now, one of the latter things you talked about, the appeal or the grievance procedure, let's call it; could you go into that in a little bit more detail in regards to just how that works? If a man, let's say, just as an example, has a letter rejected which he feels should not have been rejected, what can he do?

A He can present the facts in a written memo, it can be handwritten, no particular format, to the associate warden of custody, indicating the specific problem and asking that it be investigated, hoping that it would be overruled, of course. The associate warden of custody, if it happened to be someone acting in his capacity, whoever is filling that capacity, would make this investigation and do whatever research necessary, then make a decision; one of two, either uphold the original decision or acknowledge the appeal and reverse it and send the letter out.

If he upholds the original decision not to send it out, he will indicate in writing to the inmate why he is making his decision, and at that point the inmate then

has recourse to the warden, then ultimately to the director, of course.

Q And in any event, whether he upholds or overturns the initial action, he will put it in writing, or just if he changes it?

A Yes. Although I have sat in that capacity many times as the reviewer myself, and in the past three years I never recall how a single incident how where an inmate has ever asked for an appeal, or have a letter go out that was returned to him. Certainly none of these were.

REDIRECT EXAMINATION

Q (By Mr. Turner) Is there any hearing at all comparable to a disciplinary hearing held when the inmate wants to take an appeal like that?

A No.

MR. TURNER: I have nothing further.

--oOo--

Plaintiffs' Ex #2
11-16-72

Moran,

You have been talked to several times about your mail. You will have to tone it down further for it to be acceptable. There are too many disrespectful comments and misrepresenting of facts.

H. Morphis

Plaintiffs' Ex #5

11-16-72

Ruiz,

You can't pass out
misinformation, even if
it is a quote from the
paper.

I have been to the
new unit and it is not
designed for the type
of program you imply.

H. Morphis

Filed: Dec. 1, 1972

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
	)	No. C-71 543 ACW
Plaintiffs,	)	(Three-Judge Court)
)	
vs.)	
	)	NOTICE OF MOTION
RAYMOND K. PROCUNIER,	)	<u>FOR SUMMARY JUDGMENT</u>
et al.,)	
)	
Defendants.)	

PLEASE TAKE NOTICE that the under-
signed will move this Court, on the 22nd day
of December, 1972, at 2:00 p.m. in Courtroom
No. 7, or as soon thereafter as counsel can
be heard, for summary judgment, pursuant to
Rule 56, of the Federal Rules of Civil Pro-
cedure. This motion is based upon the foll-
owing:

- (1) Plaintiffs' Requests for Admissions and defendants' responses thereto, heretofore filed in this action.
- (2) Deposition of Raymond K. Procunier, November 16, 1972, with exhibits thereto.
- (3) Deposition of Huel D. Morphis, November 16, 1972, with exhibits thereto.
- (4) Deposition of Kenneth Warren Miranda, November 16, 1972, with exhibit thereto.
- (5) Plaintiffs' Interrogatories and defendants' answers thereto, heretofore filed in this action.
- (6) Affidavit of Alice Daniel, sworn to November 29, 1972.
- (7) Affidavit of Robert Martinez, sworn to November 17, 1972.
- (8) Affidavit of Paul A. Ellis, sworn to November 10, 1972, with exhibits thereto.
- (9) Memorandum of Points and Authorities submitted herewith, and

all other papers and proceedings heretofore filed or had herein.

DATED: December 1, 1972.

WILLIAM BENNETT TURNER

Attorney for Plaintiffs

To: Evelle J. Younger, Attorney General
6000 State Building

San Francisco, California 94102

By: Thomas A Brady, Deputy Attorney General

On February 2, 1973, the Court filed a Memorandum Opinion denying Defendants' Motion to Dismiss and partially granting Plaintiffs' Motion for a Summary Judgment. This opinion was reprinted as Exhibit A to Appellants' Jurisdictional Statement, filed in this Court on April 28, 1973, and is hereby incorporated by reference. The opinion is published at 354 F. Supp. 1092.

EVELLE J. YOUNGER, Attorney General
 of the State of California
 EDWARD A. HINZ, JR., Chief Assistant
 Attorney General--Criminal Division
 DORIS H. MAIER, Assistant Attorney
 General--Writs Section
 ROBERT R. GRANUCCI
 Deputy Attorney General
 THOMAS A. BRADY
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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
)	
Plaintiffs,)	
	)	No. C-71 543 ACW
vs.	)	(Three-Judge Court)
)	
RAYMOND K. PROCUNIER,)	
et al.,)	
)	
Defendants.)	
)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Raymond
 K. Procunier and Louis S. Nelson, the defen-
 dants above-named, hereby appeal to the Su-
 preme Court of the United States from the

final order granting plaintiffs' motion for summary judgment, entered in this action on February 2, 1973.

This appeal is taken pursuant to 28 U.S.C. section 1253.

Dated: February 28, 1973

EVELLE J. YOUNGER, Attorney General
 EDWARD A. HINZ, JR., Chief Assistant
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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
	)	NO. C-71 543 ACW
Plaintiffs,)	
	)	PLAINTIFFS' RESPONSE
vs.	)	TO DEFENDANTS'
	)	<u>PROPOSED REGULATIONS</u>
RAYMOND K. PROCUNIER,)	
et al.,)	
)	
Defendants.)	
)	

In accordance with the Court's order of February 2, 1973, plaintiffs hereby file their responses to the proposed new rules of the Director of Corrections. These responses are based on the following: the annexed memorandum; the affidavits of Gordon Van Kessel,

Carol Golubock, John MacInnis and Jack H. Aldridge, annexed hereto; plaintiffs' alternative rule regarding authorized investigators, annexed hereto; and all papers and proceedings heretofore filed or had herein.
DATED: March 15, 1973.

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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
	)	NO. C-71 543 ACW
Plaintiffs,)	
	)	PLAINTIFFS' RESPONSES
vs.	)	TO DEFENDANTS'
	)	<u>PROPOSED REGULATIONS</u>
RAYMOND K. PROCUNIER,)	
et al.,)	
)	
Defendants.)	
)	

In accordance with the Court's order of February 2, 1973, plaintiffs hereby respond to the proposed new rules of the Director of Corrections. Plaintiffs urge that the Court disapprove the rules as written and order appropriate modifications, as follows:

I. Criteria For Disapproving Mail To Or From Inmates

This proposed rule is defective in the following respects:

1. Improper Criteria -- Clear and Present Danger

The rule authorized mailroom guards to disapprove a letter, either outgoing or incoming, if they think it "presents a clear and present danger" to prison security. This is an appropriate legal standard by which a court can judge the validity of a rule or act alleged to infringe the First Amendment. Indeed, this is one of the bases on which this Court invalidated the Director's Rules involved in this case. But this is not an appropriate standard to serve as the guideline for mailroom guards. It must be remembered that the censors here are not judges, or highly qualified public officials with sensitivity to legal restrictions on censorship; they are prison guards assigned to mailroom duty, their civilian helpers, members of the night watch or the officer in charge of a lock-up unit (Procunier dep., p. 15; Morphis dep., p. 4; Miranda dep., p. 15).

It is insufficient protection to the First Amendment interests recognized by the Court to authorize guards to decide subjectively what they think may pose a "clear and present danger to the security of the institution." In their untutored judgment they might well think that "statements critical of prison life and personnel" could present such a danger, even though suppression

of this kind of communication was explicitly condemned by the Court (slip op. p. 9). What is needed, as the Court said, is that "the regulations must be more narrowly and specifically drawn" (Id.). The regulation here must give concrete guidance to the censors, so that protected communications are not suppressed, mistakenly or not.

Supplying narrow and specific guidelines that meet the legal test of "clear and present danger" is not difficult. For example, in Guajardo v. McAdams, 349 F.Supp. 211, 221 (S.D. Tex.1972), the court, while completely enjoining censorship of outgoing mail, approved a rule authorizing censorship of incoming letters containing codes, threatening blackmail, escape plots, smuggling, plots to overthrow lawful authority, etc.^{1/} The point is that the Director's Rule can, and must, provide very specific tests that are readily understandable to mailroom guards; the record here demonstrates that without such specificity, protected communications are sure to be suppressed. Further, one function of the state-wide rule ought to be promoting consistency. But entrusting individual guards with the responsibility for interpreting a difficult legal standard like "clear and present danger" can lead only to haphazard enforcement.

2. Improper Criteria-- Causing Psychiatric or Emotional Disturbance

The proposed rule bans incoming letters "which would cause a severe psychiatric or emotional disturbance to the inmate."

But mailroom guards are simply not qualified to make this judgment. We assume that defendants are concerned about the potentially disturbing effect of "Dear John" letters and the like. However, mailroom guards cannot be entrusted with the determination that a "severe psychiatric or emotional disturbance" will result from reading a letter. To the extent defendants' concern has any legitimacy, this determination should be made only upon certification of such danger by a professional psychiatrist; or the inmate's counselor could deliver the letter and provide appropriate counsel for the inmate.

1/ The text of the rule is as follows:

"The following are reasons why a letter may be rejected: (a) it may contain threats, imply blackmail and/or extortion, forbidden goods, or information or plots to escape; (b) it may discuss criminal activities; (c) it may contain codes to circumvent understanding of contents; (d) it may contain plots to use overt action to overthrow lawful authority; (e) it may contain solicitation of personal property or funds. Enclosures such as newspaper clippings, and photographs of the inmate or his family which are purely personal are allowed." 349 F.Supp. at 221.

3. Criticism of Prison Life and Personnel

Because the record here is replete with instances of censorship of criticism of prison life and personnel, and this was forcefully condemned by the Court, we believe any proposed rule must necessarily admonish mailroom staff that they may not reject letters

on such grounds. Defendants should be required to adopt a specific rule to this effect.

1. Proper Criteria for Incoming Mail

If defendants have persuaded the Court that some censorship of incoming mail is required, we respectfully suggest that the only appropriate test for excluding incoming material is that contained in Cal. Penal Code S2600 for incoming published material -- whether the matter is "of a character tending to incite murder, arson, riot, violent racism, or any other form of violence." This test has the advantage of being familiar to prison officials and thus relatively easy to apply. It is a legislative judgment as to the only kinds of incoming material that pose any real threat to security.

II. Written Statement Of Reasons For Disapproval of Mail

The record indicates that defendants have until now used printed checklists for rejecting letters, with guards merely checking general categories and returning the letters to the inmate. This does not provide the type of "notice" required by fundamental fairness. Nor does it insure that the censoring guard will thoughtfully consider exactly what is objectionable and why. We respectfully suggest that the notice must specify the objectionable part or parts of the letter and explicitly state

why it must be rejected.

A further defect in this proposed rule is that it authorizes placing of "any material from letters" in inmates' files. This should not be permitted, for obvious reasons, unless the material falls within a properly censored category under the first proposed rule; this rule should so provide.

III. Appeal of Decision Disapproving Mail

The Court held that correspondents must be afforded "a reasonable opportunity . . . to contest a decision disapproving. . . ." letters (slip op. p. 10). The proposed rule fails to specify how this may be done. It simply says that there may be an appeal "in accordance with institutional procedures." Whatever these "procedures" are, they apparently may vary from prison to prison or even within prisons. We believe defendants should be required to tell the Court exactly what the procedures are, so that they may be meaningfully evaluated. We further believe that the proposed rule must itself specify a minimum procedure in accordance with constitutional requirements. For example, in Clutchette v. Procunier, No. C-70 2497 AJZ (N.D. Cal.), the officials formulated a uniform state-wide plan for inmate discipline. Here, defendants could permit individual institutions to adopt more elaborate or detailed procedures, but they should be required to specify in the Director's Rule what minimum procedures are acceptable. Otherwise, there is sure to be a

multiplicity of litigation challenging the validity of individual prison procedures.

IV. Authorized Investigators

This proposed rule has several serious defects that completely undercut the Court's decision on access of law students and other paraprofessionals who assist attorneys:

1. Limitation to "Attorney of Record"

The rule limits access to persons working for and sponsored by "the attorney of record." This means there is no access except when there is litigation on file and the inmate is represented by an attorney. It excludes law student and paraprofessional assistance in two vital and common situations: (a) when inmates have legal problems that require counseling and investigation but no lawsuit; and (b) when an attorney has been requested to represent a prisoner but needs an investigator to gather information required for the attorney to consider such representation. In neither situation does the prisoner have an "attorney of record," yet in both situations his need for legal assistance is real. Defendants cannot justify this restriction.

This restriction and others in the proposed rule seriously handicap bona fide law student assistance programs like those at Hastings College of the Law and Stanford Law School. Annexed hereto as Exhibit A is the affidavit of Gordon Van Kessel, explaining

the defects in the proposed rule from the point of view of the Hastings program. Annexed hereto as Exhibit B is the affidavit of Carol Golubock, explaining the defects in the proposed rule from the point of view of the Stanford program.

2. Exclusion of Non-Student Paraprofessionals

The rule authorizes only attorneys, state-licensed investigators and certified law students to assist attorneys in interviewing prisoners. But the Court pointed out that access to the courts is enhanced by using "law students or other paraprofessionals" and also suggested possible use of "lay employees" of attorneys. The fact is that defendants have excluded a significant source of trained and qualified legal assistants. The San Francisco Bar Association has recently documented the growing use of non-student paraprofessionals to assist attorneys. Annexed hereto as Exhibit C is the Bar Association newsletter for March, 1973, containing a description of current developments in this field. Annexed as Exhibit D is the affidavit of John MacInnis, Associate Director of the California Public Interest Law Center at Lone Mountain College, describing a graduate program for training legal paraprofessionals. Annexed as Exhibit E is the affidavit of Jack H. Aldridge, Assistant Dean of Instruction at San Francisco City College, describing another paraprofessional training program.

Under defendants' rule all these trained and qualified legal assistants are barred. Yet as the Court pointed out, the American Bar

Association has expressly recognized the use of paraprofessionals. And the California State Bar now has under consideration studies on the proper use and training of paraprofessionals, and possible proposed legislation. See State Bar of California, Reports, June, 1972, p. 1.

Defendants have proved no possible justification for banning use of legal professionals and excluding these sources of legal assistants, and their rule must accordingly be modified.

3. Limitation to Certified Law Students

Defendants do not even permit all law students to serve as investigators. They propose a limitation to law students certified by the State Bar. This excludes all first-year students (regardless of background, training or maturity) and most second-year students. There may be justification for the State Bar to limit certification, because certified students are authorized, inter alia, to make court appearances. But there is no justification for requiring certification in order for a student, supervised by an attorney, to interview a prisoner. As the Court suggested, "bona fide law students under the supervision of attorneys" should be allowed to serve. Requiring State Bar certification does nothing to enhance prison security, but does exclude most of the law students in the state from providing needed legal assistance for prisoners.

As set forth in the affidavit of Gordon Van Kessel (Exhibit A hereto), excluding non-certified law students would virtually destroy bona fide law student programs. It may

be that programs using only certified students would be more ideal in terms of providing higher quality legal services, but the reality must be recognized that law school programs, with uncertified students, are still better than the alternative -- the jailhouse lawyer. Destruction of the present law student programs may not have been intended by defendants' proposed rule, but that is its effect.

4. Unspecified Procedures

The proposed rule requires the sponsoring attorney to file an "information form" and submit it "in accordance with institutional rules." Defendants do not tell the Court what must be in the information form and fail to specify what the institutional rules are. As in the case of censorship procedures (see p. 5, supra), defendants must formulate a state-wide rule that permits a meaningful evaluation by the Court and that specifies exactly what sponsoring attorneys and their investigators are required to do in order to have the benefit of the Court's decision. Otherwise, substantive and procedural limitations, imposed by individual institutions or officials, which may well emasculate the Court's decision, are certain to proliferate litigation.

5. Prior Notice of Visits

The proposed rule requires filing of an "information form" at least one week prior to every law student visit. Defendants do not say so, but we assume this is intended to allow time for a security check of the

student. This may be permissible for the student's first visit, but it is completely unjustified for subsequent visits. The lack of justification is especially obvious when there are subsequent visits to the same inmate and when there are litigation deadlines -- the rule makes no exception for meeting court deadlines. This rule's interference with bona fide law student programs is demonstrated by Exhibits A and B hereto.

6. The Attorney's "Responsibility"

The rule states in the broadest possible terms that "the attorney must accept responsibility in writing for the conduct of investigators acting on his behalf." No form of the "writing" is provided. We have no difficulty in accepting professional responsibility for the work of such investigators, as required by applicable Bar Standards. But it is unreasonable for defendants to hold attorneys "responsible" for all acts of their investigators, regardless of whether the acts are within the scope of the assignment or beyond the attorney's control. All that defendants can reasonably require is that the attorney state his belief in the assistant's moral integrity, as is customary in Bar admission matters.

* * *

Because of the many defects in defendants' proposed rule on authorized investigators, we have drafted an alternative rule, annexed hereto as Exhibit F.^{2/} We believe

our alternative rule adequately protects the interests of all -- inmates, attorneys, law student programs, legal paraprofessionals and the prison system -- while accurately reflecting the Court's decision.

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2/ Our draft is intended to replace all of Rule MV-IV-02 (except paragraph 9, the "eavesdropping" paragraph).

CONCLUSION

For reasons stated, the Court should reject the proposed rules as written and order defendants to make modifications in accordance with the foregoing.

Respectfully submitted,

WILLIAM BENNETT TURNER

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
	)	NO. C-71 543 ACW
Plaintiffs,)	
	)	AFFIDAVIT OF
vs.	)	<u>GORDON VAN KESSEL</u>
)	
RAYMOND K. PROCUNIER,)	
et al.,)	
)	
Defendants.)	

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

GORDON VAN KESSEL, being duly sworn,
deposes and says:

1. I teach Advanced Criminal Procedure at Hastings College of the Law, San Francisco, California. I also head the clinical program in criminal law, and I am faculty adviser for the Hastings Indigent Criminal Appeals Program ("HICAP").

2. The HICAP program involves Hastings law students in criminal appeals and collateral remedies of persons convicted of crime. The program is wholly student-run, with minimal supervision. The students' activities include interviewing prisoners,

discussing with them legal points they desire to raise, clarifying legal issues, drafting legal pleadings and briefs, etc. The students render services to prisoners in several California prisons. The HICAP program does not require students to be certified in accordance with the rules of the State Bar.

3. If HICAP students were required to be so certified, it would be practically impossible to operate the program. In the first place, students cannot be certified under the State Bar rules unless they have completed at least three semesters or four quarters; this excludes all first-year students and many second-year students. Further, there are not attorneys available to provide the kind of supervision required by the State Bar. The State Bar requires supervising attorneys to have actively practiced law as a full-time occupation for at least two years. Even some law school professors cannot meet this requirement. Further, we could not find qualified attorneys who would be willing to spend the uncompensated time required to provide the careful supervision specified by the State Bar. Finally, the State Bar certification rules prohibit certified law students from giving legal advice except in the personal presence of the supervising attorney. This is not possible in the HICAP program, because there are no attorneys available to go to the prison with the law student for the purpose of conveying advice to the prisoner.

4. Further, limiting student assistants

to those assisting an "attorney of record" would seriously undermine the HICAP program. This is because much of the work of the students involves interviewing prisoners and investigating their claims, for the purpose of advising them whether such claims have any merit. In many cases, no litigation is filed and so there is no "attorney of record." Any rule limiting student access to prisoners on the ground that they are not assisting the "attorney of record" would eliminate this kind of preliminary legal assistance to prisoners that is necessary to sort out meritorious from frivolous claims.

5. Excluding uncertified law students from prisons, and limiting access only to those assisting an "attorney of record" would seriously diminish the effectiveness of the HICAP program. Further, I believe that such exclusion and limitation would significantly reduce available legal assistance for prisoners. Unfortunately, the only alternative for prisoners would then be the jailhouse lawyers. I believe that law student programs like HICAP are preferable to jailhouse lawyers from all points of view.

GORDON VAN KESSEL

Sworn to and subscribed before me,
this 13th day of March, 1973.

Notary Public

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
)	
Plaintiffs,)	
)	
- v. -	)	No. C-71 543 ACW
)	
RAYMOND K. PROCUNIER,)	
et al.,)	
)	
Defendants.)	
)	

AFFIDAVIT OF CAROL GOLUBOCK

STATE OF CALIFORNIA)
COUNTY OF SANTA CLARA) ss.

I, CAROL GOLUBOCK, being duly sworn depose and say:

The Stanford Law School Chapter of the Law Students Civil Rights Research Council (LSCRRRC) initiated a program of legal assistance to inmates of the Correctional Training Facility (CTF), Soledad, California, in February, 1972. The program was established as a result of an agreement among former Associate Superintendent Donnelly of the CTF, Associate Dean William Keogh of Stanford Law School, and the affiant, a student representative of the Stanford Chapter of LSCRRRC.

The program began operation with a part-time volunteer staff of Stanford law students, all of whom were under the supervision of

David Kirkpatrick, an attorney with California Rural Legal Assistance in Salinas, California, and "bar-certified" pursuant to the Rules for the Practical Training of Law Students as promulgated by the California Bar Association. The volunteer students interviewed inmates upon written request of the inmates sent either to Mr. Kirkpatrick or directly to the students. After consultation with Mr. Kirkpatrick, the students provided legal advice to the inmates and assisted in instituting legal action whenever it was necessary and feasible to do so.

During the summer of 1972, the program continued with a staff of four students working full-time, funded on a subsistence basis by fellowships from the western regional office of LSCRRC.

In the fall of 1972, Stanford LSCRRC attempted to reinstate its school year program as it had operated during the winter and spring of 1972. There were approximately thirty students interested in working in the program, ten of whom were to interview inmates inside CTF, twenty of whom were to research legal issues arising in the interviews. Additionally, plans had been made to conduct legal classes inside CTF. The purpose of these classes was to improve the quality of the legal papers filed by inmates and to decrease the number of frivolous writs coming out of CTF.

However, the program was temporarily suspended by the Soledad officials in September, and cancelled in late November, 1972.

As an officer of the Stanford LSCRRC chapter, I have studied the rule proposed by the California Department of Corrections regarding attorneys' use of investigators and law students. I have also discussed the proposed rule with the other students in the LSCRRC program. On the basis of our experience as law students providing legal assistance to inmates at Soledad prison from February, 1972 to September, 1972, we have concluded that the rule as proposed would adversely affect our ability to provide adequate legal assistance to prison inmates in the following ways:

1. THE PROPOSED RULE REQUIRES THAT THE SPONSORING ATTORNEY BE THE "ATTORNEY OF RECORD".

The requirement that law students be sponsored by the "attorney of record" for an inmate would greatly reduce the number of inmates for whom the supervising attorney could provide legal assistance. Most of the interviews done under the LSCRRC program were undertaken for the purpose of providing Mr. Kirkpatrick, the sponsoring attorney, with preliminary information necessary for him to determine whether or not to become the attorney of record. This procedure allowed Mr. Kirkpatrick to devote his time to cases which required legal action. This screening process constituted a most valuable aspect of LSCRRC program, an aspect which would be eliminated by requiring the sponsoring attorney himself to determine if

he or she wished to become the attorney of record.

2. THE PROPOSED RULE REQUIRES THAT ALL INMATE REQUESTS BE SENT TO THE SUPERVISING ATTORNEY.

While the proposed rule would not totally preclude an attorney's use of certified law students, it would greatly and unnecessarily hamper the communications between the investigator and the inmate.

Once the LSCRRRC program had been in operation for a few weeks, the inmates began to send their requests directly to Stanford LSCRRRC or to a particular student rather than to the supervising attorney. After our program had been in existence for two months, approximately 75 percent of our interviews were undertaken on the basis of request directed to a certified law student. The LSCRRRC program operated on this basis for about nine months with no objection ever being raised by the CTF administrators. This indicates that there is no substantial administrative purpose to be served by requiring that the request always be made to the supervising attorney.

The primary effect of the proposed rule in our situation would be to require the student/investigator to write back to the inmate telling him to direct all correspondence to the supervising attorney. This would delay the inmate's receiving legal assistance, particularly as extra time is involved in checking any mail in and out of a prison.

More importantly, the delay may cut off communications altogether. Many inmates have related to us the frustrations encountered and time consumed in appealing to attorneys and others for help with their cases. Often the inmates had written to their original attorneys, the convicting court and numerous legal groups before contacting us. By the time many reached us, they had given up hope of ever receiving aid. Disappointed by an endless series of referrals, many had decided to give up or proceed on their own. If we had answered their letters with yet another referral, they might have given up and not written the supervising attorney.

Even if the inmate follows through on this additional referral -- writing to the supervising attorney after having written to the student -- the subsequent relationship may well be hampered by the additional delay. This is the case particularly where the inmate's claim is without merit because it is difficult to convince him of this fact if he is not first convinced that the student has taken a true interest in him. Any lengthy delays in responding to the request for assistance are likely to make it difficult to establish a relationship of trust and to increase the difficulty involved in convincing the inmate that his claim is frivolous, if that is the case.

3. THE PROPOSED RULE RESTRICTS ATTORNEYS' USE OF LAW STUDENTS TO THOSE WHO ARE CERTIFIED BY THE STATE BAR.

While the LSCRRRC interviewing program has always operated solely with certified law students, our experience indicates that this is not essential to the interviewing process. Bar certification under the Rules enables a law student, with three semesters completed, to appear in court and to draft legal papers subject to the supervising attorney's approval. Both of these matters may require some scholastic training. However, the interviewing of prisoners for the purpose of determining the facts of their cases does not require such training. Therefore, it appears reasonable that, in the interest of providing prisoners with legal help not otherwise available, an attorney should be entitled to delegate the interviewing tasks to any law student or legal paraprofessional with whose qualifications he is familiar and for whom he would be willing to assume professional responsibility.

Moreover, a student program may be hampered by the requirement that all the student/investigators be certified under the Bar Rules for the following reasons:

a. We have found very few attorneys who are willing to devote substantial amounts of time to the assistance of inmates. Those who are willing are limited by the Bar Rules to the supervision of ten students regardless of the amounts of time they and the students will devote to the assistance of inmates.

A supervising attorney may need certified law students in other areas of his practice. Thus, he will be limited to less than

ten students, although he may be willing to spend a substantial amount of time supervising students in a prison program. Student prison programs in other states have devised standardized procedures for students to follow that limit the amount of direct attorney supervision necessary.

The proposed rule thus serves to limit arbitrarily the number of students available to provide legal assistance to inmates.

b. There are very practical problems of recruitment and continuity in a student-run prison program. Certification requires the completion of three semesters of law school. Recruitment and training of qualified law students for the prison program can only take place in the middle of the school year when second-year students have already made commitments to jobs or other programs, or at the beginning of the school year when only third-year students are eligible. Most students can thus be recruited only at the beginning of their third year. Therefore, the effect of the certification requirement is that an enormous turnover of personnel occurs each fall, when inexperienced third year students enter the program to replace those who participated in the program the previous year but have graduated.

c. We have found there to be a great deal of enthusiasm for the prison program among first and second year students. While these students are fully capable of conducting "intake" interviews, and do so for other legal programs, they would be

delayed by the proposed rule from entering fully into the prison program until they have completed the first half of their law school career. The prison program often loses them to programs in which they can participate fully, programs which are more attractive for that reason.

4. THE PROPOSED RULE REQUIRES AN INFORMATION FORM TO BE FILED BY THE SPONSORING ATTORNEY FOR EACH STUDENT ONE WEEK PRIOR TO EACH VISIT.

The requirement that the attorney file an information form for each student on every occasion the student enters the prison appears unnecessary. For the LSCRRRC program, CTF required only that Dean William Keogh attest to the qualifications of interviewing students before their first visit to Soledad. This initial information has been sufficient in the past to satisfy institutional security requirements.

The requirement that the institution be notified one week in advance of each visit is burdensome. The LSCRRRC program at CTF operated on the basis of a three day notice requirement during the spring and summer of 1972. We found on occasion that even this much notice created problems for our program. The first, of course, was the inability to respond immediately to urgent requests for help.

But beyond this problem, a notice requirement creates several difficulties, which are endemic to a student program located at

school a substantial distance from the prison. First, law students are heavily burdened by academic commitments; it is often difficult to know even three days in advance whether or not it will be possible to devote the entire day necessary for a trip to Soledad (a round-trip of 200 miles) to interview prisoners.

Second, not all students have automobiles. In the past, it was necessary for our program on occasion to borrow cars to go to Soledad. Occasionally a trip to the prison was arranged and the phone call made to the prison, but car transportation subsequently became unavailable. An additional three-day delay was then mandated by the notice requirement. Students were not allowed to come the day following such an aborted trip. These postponements placed a strain on our relationships with inmates who had been counting on talking to a student on a particular day.

5. THE PROPOSED RULE REQUIRES THAT A LETTER FROM THE SUPERVISING ATTORNEY TO THE PRISON OFFICIALS BE PRESENTED BY THE STUDENTS ON EACH VISIT NAMING THE INMATES TO BE INTERVIEWED.

The LSCRRRC program operated in the spring and summer of 1972 on the basis of an agreement with the officials at CTF that a telephone call from the students naming the inmates to be interviewed provided adequate information to the prison. The proposed rule imposes a burdensome administrative procedure. The students must insure that the supervising attorney, who is often located far from the

law school (David Kirkpatrick is 100 miles from Stanford), send the required letter to the students in time for the visit. If the attorney was in trial or for some other reason unavailable, the interview would have to be postponed until the attorney could be contacted despite the demands of an inmate's case. Any mistakes in a letter probably could not be corrected in time for the scheduled visit.

Any purposes served by requiring that the students present a letter from the attorney authorizing each visit would also be served by the less burdensome means of: 1) requiring that the attorney notify the institution of the names of his or her investigators before their initial interviews; and 2) requiring that the investigator phone the prison before each visit, informing officials of the names of prisoners who had requested assistance and bringing to the prison on the visit some evidence of the prisoner's request for services.

Dated at Palo Alto, California, this 9th day of March, 1973.

Carol Golubock
For the Law Students Civil
Rights Research Council
Prison Law Group

Subscribed and sworn to before
me this 9th day of March, 1973.

Notary Public
My commission expires:

EXHIBIT D

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,	)	NO. C-71 543 ACW
	)	(Three-Judge Court)
Plaintiffs,)	
)	
vs.)	
	)	AFFIDAVIT OF
RAYMOND K. PROCUNIER,	)	<u>JOHN MacINNIS</u>
et al.,)	
)	
Defendants.)	

STATE OF CALIFORNIA)
) ss.
 COUNTY OF SAN FRANCISCO)

JOHN MacINNIS, being duly sworn, deposes
 and says:

1. I am the Associate Director of the California Public Interest Law Center at Lone Mountain College. My office is located at 2800 Turk Boulevard, San Francisco, California.

2. The program I direct is designed to train highly qualified legal paraprofessionals. A brochure describing the program is annexed hereto as an Exhibit.

3. Under the public interest advocacy part of the paraprofessional program, we now have about 15 students enrolled. Their average score on the Law School Aptitude Test is about 620. They are all college graduates and are full-time students in our graduate program. The program leads to a Master's degree in Legal Science. All of the students are expected to be placed in field study programs. In some of the programs, it is likely that they would deal with the problems of prisoners in California institutions.

4. We presently have enrolled in the complete paraprofessional program about 40 students. Not all of these are full-time. Many are employed by large law firms. This year, we had about 120 applicants for the program.

5. I am aware of other legal paraprofessional training programs in operation in the Bay Area. Specifically, there are programs at San Francisco City College, Merritt College in Oakland, and Dominican College in San Rafael.

6. Our program is based in part on the concept that needed legal services can greatly be expanded by the use of qualified and trained paraprofessionals assisting attorneys. This concept applies as well to prisoners needing legal services, and I believe that legal paraprofessionals trained in our program could perform useful services in this area.

JOHN MacINNIS

Sworn to and subscribed before me,
this 9th day of March, 1973.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
	)	NO. C-71 543 ACW
Plaintiffs,	)	(Three-Judge Court)
)	
vs.	)	AFFIDAVIT OF DEAN
	)	<u>JACK H. ALDRIDGE</u>
RAYMOND K. PROCUNIER,)	
et al.,)	
)	
Defendants.)	
<hr/>		
STATE OF CALIFORNIA)	
	)	ss.
COUNTY OF SAN FRANCISCO)		

JACK H. ALDRIDGE, being duly sworn,
deposes and says:

1. I am the Assistant Dean of Instruction at San Francisco City College.
2. City College operates a complete program for the training of legal paraprofessionals. A description of our program is set forth in the brochure annexed hereto as an Exhibit. Our program includes several courses designed to equip legal paraprofessionals with the necessary skills for legal assisting, and the two-year program leads to an Associate of Arts degree. We expect to place graduates in law offices,

governmental agencies and business firms. Approximately 152 students are presently enrolled in our program.

3. As stated in the Exhibit hereto, our program is designed to aid the legal profession to meet the increasing demand for legal services and to provide those services more efficiently and with less delay through the use of legal assistants. I believe that trained legal assistants would also be fully qualified to assist attorneys in representing prisoners with their legal problems, and I believe that legal paraprofessionals trained in our program would perform useful services in this area.

DEAN JACK H. ALDRIDGE

Sworn to and subscribed before me,
this 13th day of March, 1973.

Notary Public

PROPOSED RULE -- AUTHORIZED INVESTIGATORS

(A) The following persons will be permitted to interview an inmate with his consent during normal visiting hours, subject to institutional security regulations:

(1) an attorney who is counsel of record for the inmate in any legal matter, or who has been asked to represent or advise the inmate by either (a) the inmate, or (b) a member of the inmate's family or other person authorized by the inmate to seek legal assistance for him; and

(2) a designated representative of such an attorney.

(B) For the purposes of this rule:

(1) An "attorney" means any member of the State Bar, or any person whose appearance on behalf of the inmate has been filed in any court, by leave of the court.

(2) A "designated representative" means any of the following persons designated by the attorney to represent him in the matter of interviewing inmates:

- (a) an investigator licensed by the State;
- (b) a member of the State Bar;
- (c) a student in good standing in any accredited law school;
- (d) a legal paraprofessional employed by the attorney.

(3) An attorney may designate a representative or representatives by a written letter of authorization which shall be dated and shall be effective for one year from its date unless it expressly specifies a shorter period of authorization. The letter may authorize its addressee to represent the attorney in interviewing a named inmate or inmates, or in interviewing any class of inmates or all inmates whom the attorney himself may interview. Second or successive letters of authorization may be issued during or after the effective periods of earlier letters. The letter or a facsimile of it bearing the original or a photocopy of the attorney's signature shall be presented to the authorities of the institution at their request, together with a motor vehicle operator's license or other document sufficient to identify the bearer as the person designated in the letter, before an attorney's designated representative is admitted to an institution to interview an inmate.

(4) Unless the attorney is counsel of record for an inmate, the authorities of the institution may also request proof that the attorney has been asked to represent or to advise the inmate, before admitting either the attorney or his designated representative to the institution to interview the inmate. Presentation of a letter or an envelope addressed to the attorney or to his designated representative,

bearing inmate's name in the return address, shall be sufficient proof for this purpose, and the contents of the inmate's letter shall not be required to be disclosed.

(5) An inmate may ask an attorney to represent or to advise him by a letter addressed either to the attorney or to the attorney's designated representative, asking for the assistance of either the attorney or the representative.

- (C) (1) When an attorney's designated representative is a law student or a legal paraprofessional and has not been admitted to a particular institution under this Rule during a period of six months prior to the date on which he seeks to interview an inmate, the attorney shall mail to the institution, at least one week prior to the proposed interview, a completed copy of the following information form:
- _____
- _____
- _____

In addition to other information specified by the defendants in the body of this Rule and reasonably necessary to assure institutional security, the form may include the attorney's representations that:

- (1) the attorney is satisfied that the character of the designated representative is good; and

(2) the attorney agrees to assume responsibility for the professional performance of the designated representative.

(2) Except as provided by the preceding paragraph, the authorities of an institution shall not require any other or different notice of the visit of an attorney's designated representative for the purpose of interviewing an inmate than would be required for the attorney himself.

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FILED

MAR 21 1973

CLERK, U.S. DIST. COURT
SAN FRANCISCOIN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,	)	CASE NO. C-71 543 ACW
	)	(Three-Judge Court)
Plaintiffs,)	
vs.	)	ORDER REGARDING PRO-
	)	POSED REGULATIONS AND
RAYMOND K. PROCUNIER,	)	GRANTING A FURTHER
et al.,	)	<u>STAY</u>
)	
Defendants.)	
)	

The Court, having received plaintiffs' response to defendants' proposed regulations, orders that defendants file a reply thereto on or before April 9, 1973. Prior to filing of said reply, the Court orders that counsel for plaintiffs and defendants discuss the proposed regulations and objections so that any areas of agreement may be incorporated in defendants' reply. Plaintiffs should submit further alternative proposals covering any issues left unresolved by defendants' reply.

The Court's order of February 2, 1973 is stayed pending further order of this Court insofar as it enjoins enforcement of the current regulations.

Dated: March 21, 1973

Ben C. Duniway
U. S. Circuit Judge

Alfonso J. Zirpoli
U. S. District Judge

Albert C. Wollenberg
U. S. District Judge

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 of the State of California
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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
)	
Plaintiffs,)	
)	
vs.	)	NO. C-71 543 ACW
	)	(Three-Judge Court)
RAYMOND K. PROCUNIER,)	
et al.,)	
)	
Defendants.)	
)	

PROPOSED REGULATIONS (Revised)

In accordance with this Court's order of March 21, 1973, and in light of Plaintiffs' written and oral responses to defendants' proposed regulations filed in this Court on March 1, 1973, the following new regulations

of the Director of the Department of Corrections are submitted for the Court's approval:

CORRESPONDENCE

A. Criteria for Disapproval of Inmate Mail

1. Outgoing Letters

Outgoing letters from inmates of institutions not requiring approval of inmate correspondents may be disapproved for mailing if the content falls as a whole or insignificant part in any of the following categories:

- a. The letter contains threats.
- b. The letter threatens blackmail or extortion.
- c. The letter concerns sending prohibited material into or out of institutions.
- d. The letter concerns plans to escape.
- e. The letter concerns plans for activities in violation of institutional rules.
- f. The letter concerns plans for criminal activity.
- g. The letter is in code and its contents are not understood by the reader.
- h. The letter solicits gifts of goods or money from other than immediate family.
- i. The letter is obscene.
- j. The letter contains information which otherwise presents a clear

and present danger to the security of the institution.

Outgoing letters from inmates of institutions requiring approval of correspondents may be disapproved for any of the foregoing reasons, or if the addressee is not an approved correspondent of the inmate and special permission for the letter has not been obtained.

2. Incoming Letters

Incoming letters to inmates may be disapproved for receipt for any of the foregoing reasons, if the letter contains material which would cause severe psychiatric or emotional disturbance to the inmate, or in an institution requiring approval of inmate correspondents, is from a person who is not an approved correspondent and special permission for the letter has not been obtained.

3. Limitations

Disapproval of a letter on the basis that it presents a clear and present danger to the institution and which is not disapproved for another of the authorized reasons will be done only at the program administrator or higher level.

Disapproval of a letter on the basis that it would cause severe psychiatric or emotional disturbance to the inmate will be done only by the inmate's

caseworker, after consultation with institutional psychiatric personnel if that is deemed appropriate in the particular case.

Outgoing or incoming letters may not be rejected solely upon the ground that they contain criticism of the institution or its personnel.

4. Notice of Disapproval of Inmate Mail

When an inmate is prohibited from sending a letter, the letter and a written and signed notice stating one of the authorized reasons for disapproval and, if appropriate, reference to the portion of the letter requiring disapproval, will be given the inmate. If an inmate is prohibited from receiving a letter, a written and signed notice stating one of the authorized reasons for disapproval and, if appropriate, reference to the portion of the letter requiring disapproval, will be given the inmate and the sender, and the letter will be returned to the sender.

If copies of any material from letters are placed in an inmate's file, the inmate will be notified of the action in writing.

B. Investigators

Investigators for an attorney of record must be licensed by the state, must be

members of the State Bar, or be law students certified under the State Bar Rules for the Practical Training of Law Students and sponsored by the attorney of record. Designation must be in writing by the attorney of record.

If it is proposed that a certified law student serve as an investigator, the sponsoring attorney must complete and file an information form in accordance with institutional rules for the purpose of obtaining identifying information about the student. Such form must be filed at least one week prior to the initial proposed confidential visit by the law student on behalf of the attorney. For each visit, the law student must present a letter signed by the sponsoring attorney of record naming the inmate or inmates to be interviewed by the law student, and the interviews will be limited to those inmates only. When a law student has been properly authorized to act on behalf of an attorney, he will be granted the privileges of the attorney. The attorney must accept responsibility in writing for the conduct of investigators acting on his behalf.

These rules are not intended to apply to law student assistance programs operating pursuant to agreements between the

Department of Corrections and various law schools. Such programs must be operated in accordance with the individual agreements.

DATED: April 23, 1973

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
)	
Plaintiffs,)	
)	
vs.	)	No. C-71 543 ACW
	)	(Three-Judge Court)
RAYMOND K. PROCUNIER,)	
et al.,)	
)	
Defendants.)	
)	

APPENDIX

The following paragraphs deal with areas in which it is felt that the parties are in substantial agreement, but in which defendants have not deemed it necessary to reflect that agreement in specific new regulations:

1. Appeal Procedure

Plaintiffs' responses to defendants' initial proposed regulations were deficient in failing to specify the mechanics of the procedure for appealing a decision disapproving the mailing or receipt of a letter. The general revision of the Director's Rules will contain a provision concerning the right to administrative review of all grievances (other than grievances concerning the disciplinary process and the Adult Authority hearing procedure, which are treated separately). It is submitted that this general appeal provision suffices to allow for review of an adverse decision concerning correspondence, without unduly lengthening the Director's Rules.

2. Definition of Attorney of Record

Plaintiffs criticize the proposed regulations on the ground that it limits access to persons working for and sponsored by an "attorney of record" on the ground that it does not cover situations where no lawsuit is on file or contemplated. Other rules, however, define this term without so restricting it. All that is required is agreement between the inmate and the attorney for the visit and the formation of an attorney-client relationship.

3. Student Information Form

Plaintiffs complain that the requirement that the sponsoring attorney file an information form might lead to the

imposition of imposition of other restrictions not contemplated in the Court's opinion. Defendants have not included a proposed form in the Director's Rules for reasons of brevity only. Attached is a draft of a proposed form to be used for this purpose. We submit that this form is unobjectionable.

DATED: April 23, 1973

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General of the State of
California

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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,	)	NO. C-71 543 ACW
)	
Plaintiffs,	)	PLAINTIFFS' RESPONSE
	)	TO DEFENDANTS'
vs.	)	REVISED PROPOSED
RAYMOND K. PROCUNIER,	)	<u>REGULATIONS</u>
et al.,)	
)	
Defendants.)	
)	

In accordance with the Court's order
 of March 21, 1973, plaintiffs respond as
 follows to the revisions of the regulations
 proposed by defendants:

A. Criteria For Disapproval of Inmate Mail

The revised regulation is no improvement over defendants' first regulation, and is in violation of the Court's decision. The Court held that contents of letters cannot be prohibited unless they constitute a clear and present danger to institutional security. Defendants' new rule, however, prohibits numerous kinds of expression that do not constitute a clear and present danger to anything and are not without the ambit of the First Amendment. See, e.g., categories (a), (e) and (h).^{1/} Even advocacy of force or law violation cannot be proscribed "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); cf. Noto v. United States, 367 U.S. 290, 297-98 (1961); Yates v. United States, 354 U.S. 298 (1957). The revised rules, however, proscribe speech that does not even constitute advocacy of anything illegal.

Further, the revised rules share all the defects of vagueness of the rules held

^{1/} Since violation of correspondence rules is itself a disciplinary offense, category (e) creates, through punishment of speech, a violation of institutional rules where one has not yet been committed. A regulation that fails to distinguish between expression, or even advocacy, and imminent lawless action is invalid. See Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969); cf. Yates v. United States, 354 U.S. 298 (1957).

unconstitutional by the Court. For example, category (a) prohibits "threats". Of what? A threat to file suit against the officials can be construed to violate this rule, as can other kinds of innocuous expression deemed "threats" by mailroom guards. Similarly, what is "prohibited material" outlawed by category (c)? The revised rules, like the original rules, force prisoners to risk guessing at what is prohibited speech or to forego expressing their true thoughts; and they provide insufficient guidance to mailroom guards to sort out protected from proscribed expression. They lack the narrow specificity required of speech regulations. See Keyshian v. Board of Regents, 385 U.S. 589, 604, 609 (1967); Dombrowski v. Phister, 380 U.S. 479, 487 (1965); see generally Note, Prison Mail Censorship and the First Amendment, 81 Yale L. J. 87, 94-104 (1971).

Finally, the "revised" rule still contains a catchall category, category (j), that outlaws anything that might present a "clear and present danger", without any specificity. This can easily swallow all other reasons and suppress protected expression. This provision is defective for all the reasons stated in our Responses to the earlier proposed regulations (see pp. 2-3). The defects are not cured by the provision that this category can be invoked only by

prison personnel at the "program administrator" or higher level. This is insufficient protection for the rights involved. For example, Mr. Morphis, who has disapproved a great number of inmate letters for the most unconstitutional reasons, is a program administrator (Morphis dep., p. 3). It is well settled that the "lodging of such broad discretion in a public official," even a mayor or chief of police, impermissibly "allows him to determine which expressions of view will be permitted and which will not." Cox v. Louisiana, 379 U.S. 536, 557-58 (1965); cf. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

There are still other unjustifiable provisions in the regulations:

1. Defendants continue to provide that an incoming letter is prohibited if it "contains material which would cause severe psychiatric or emotional disturbance to the inmate." Defendants now say that such a letter will be disapproved only by the inmate's caseworker (after consulting with psychiatric personnel only "if that is deemed appropriate"). We submit that this is not a permissible basis for disapproving a letter that otherwise would have constitutional protection. Defendants have never explained why this provision is required. ^{2/} Only if the "psychiatrist or

^{2/} It seems silly that a man whose wife or girlfriend has announced her intention to leave him must forever be kept in the dark about this fact, but this is the result of defendants' proposed rule, which bars the prisoner from getting the news.

emotional disturbance" is likely to result in violence or escape would there be a clear and present danger to security. Accordingly, if defendants wish to prohibit letters that might disturb inmates, they must include a provision specifying the likelihood of imminent violence or escape, and must further provide that this determination can only be made upon written certification by a qualified psychiatrist.

2. Defendants' proposed "notice of disapproval of inmate mail" is still defective. The notice would only inform the inmate of the objectionable part of the letter if someone deemed it "appropriate". The objection at p. 4 or our earlier Responses still applies.

3. Defendants still insist that they may place letters or material from letters in an inmate's file (which the record shows is available to classification committees and the Adult Authority in considering parole) even though the material or letters do not violate any applicable rules. This is one of the chilling actions explicitly complained about in this suit and noted by the Court (slip op. p. 6-7). In the discussion between counsel directed by the Court, defendants took the position that (1) anything the Department of Corrections can legally "see" it can legally put in an inmate's file; and (2) no court decisions bar the Department from placing any material whatever in an inmate's file. The Court should firmly reject this position, for exercise of the rights recognized by the Court's decision (e.g. to criticize prison

life or personnel) will surely be discouraged. Constitutionally protected expression in letters cannot, consistently with the Court's decision, be placed in an inmate's file for possible later use against him.

4. Finally, defendants still have not told the Court what the appeal procedure will be when an inmate wishes to contest the decision disapproving his correspondence. Defendants' "Appendix" states the procedure will be uniform for all kinds of grievances. Plaintiffs have no objection to a uniform procedure, but we do maintain that defendants must inform the Court and counsel what the procedure is so that it may be evaluated.

Because of the numerous defects that defendants' revised rules still contain, we have drafted proposed rules on mail censorship, including criteria and appeal procedures, and we submit them herewith.^{3/}

^{3/} Our proposal provides, inter alia, that contents concerning present or planned criminal activity may be prohibited if the activity would be in violation of Penal Code. This is in accordance with a recent decision by Judge Peckham specifying that jail rules generally can create offenses only if the conduct violates the Penal Code. See Batchelder v. Geary, ___ F. Supp. ___, No. C-71 2017 RFP (N.D. Cal. April 16, 1973).

B. Investigators

Defendants' revised rules on investigators contain almost all of the defects of the earlier rules. Thus, they completely bar all paraprofessionals other than law students. This is impermissible for the reasons stated in our earlier Responses at pp. 6-7. The revised rules further limit law students to those certified by the State Bar. This is impermissible for the reasons stated in our earlier Responses at pp. 7-8. The Court must recognize that the simple formality of certification by the State Bar provides no protection whatever to the Department of Corrections (no security check is involved); defendants' rule simply has the effect of eliminating one-half of the law students in the state from assisting prisoners.^{4/}

^{4/} Defendants' statement that the revised rules "are not intended to apply" to formal law student programs (which may utilize non-certified students) demonstrates that defendants have no legitimate interest in requiring certification since, as our earlier Responses showed (pp. 7-8 and affidavits of Gordon Van Kessel and Carol Golubock), the programs provide little or no supervision and defendants do not do any security checks. Nor does defendants' new disclaimer of effect on existing programs protect against their arbitrary destruction at any time, as apparently happened to the Stanford program (Golubock affid., p. 2).

Nor does the statement in defendants' "Appendix" defining an "attorney of record" cure the defects stated in our earlier Responses at pp. 5-6. We submit that all that can be required for an attorney's investigator to interview a prisoner is that there be a written request from the prisoner to the attorney for legal assistance. Defendants cannot justify requiring an "agreement" between the inmate and the attorney and "the formation of an attorney-client relationship." In very many cases, a busy attorney would have occasion, when requested by a prisoner, to send an investigator to help the attorney decide whether there is anything to the inmate's case, before making any "agreement" with the prisoner or bringing about "the formation of an attorney-client relationship" (see affidavits of Alice Daniel, Gordon Van Kessel, Carol Golubock).

Finally, defendants continue to require that the attorney accept "responsibility" for the conduct of investigators acting on his behalf. We disagreed with this open-ended responsibility in our earlier Responses. Defendants' submission of the law student "Information Form" with their revised rules has fully confirmed our fears. The "Information Form" requires the attorney to certify in writing that he accepts "full responsibility for the student's compliance with public laws and with the rules of the institutions visited." This is truly outrageous. No careful attorney would ever sign such a form. If the student were ever charged with any kind of misconduct,

the attorney signing the form would be subject to unknown, unspecified and possibly serious criminal and other sanctions.^{5/} The form can only have been designed to frustrate and limit the rights to broader legal assistance recognized by the Court's decision. As we stated in our earlier Responses at p. 9, attorneys may be required to accept professional responsibility for the student's work, and to vouch for the student's moral character, but defendants cannot justify requiring the attorney to accept unlimited "responsibility" for whatever a student might do.

CONCLUSION

For the reasons stated herein, and in our earlier Responses, we urge the Court to disapprove defendants' proposed regulations and to order the adoption of the regulations submitted by plaintiffs.

5/ Indeed, in the discussion between counsel directed by the Court, defendants informed counsel for plaintiffs that, although not specified by the rule, defendants would bar the attorney from further visits if a student assistant had offended prison regulations.

Respectfully submitted,

WILLIAM BENNETT TURNER

Attorney for Plaintiffs

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,	)	NO. C-71 543 ACW
)	
Plaintiffs,)	
	)	PLAINTIFFS'
vs.	)	PROPOSED RULES
	)	ON MAIL
RAYMOND K. PROCUNIER,	)	<u>CENSORSHIP</u>
et al.,)	
)	
Defendants.)	
)	

I. Criteria For Disapproving Mail To Or From Inmates

Outgoing letters from inmates in institutions not requiring approval of inmate correspondents may be disapproved for mailing only if the content concerns present or planned

criminal activity in violation of the Penal Code (including smuggling contraband and escape), is obscene or is in code designed to circumvent understanding of its contents.

Outgoing letters from inmates of institutions requiring approval of correspondents may be disapproved only for the foregoing reasons or if the addressee is not an approved correspondent of the inmate and special permission for the letter has not been obtained.

Incoming letters to inmates may be disapproved for receipt only if the content concerns present or planned criminal activity in violation of the Penal Code (including smuggling contraband and escape), is obscene or is in code designed to circumvent understanding of its contents; or, in an institution requiring approval of inmates' correspondents, a letter may be disapproved if it is from a person who is not an approved correspondent and special permission for the letter has not been obtained.

Sending and receiving letters is not a privilege but is a right of inmates that cannot be interfered with except that a specific letter may be disapproved if its contents are in violation of the foregoing rules.

II. Criticism Of Prison Life And Personnel

In no event can any letter, incoming or outgoing, be disapproved on the ground that the contents criticize prison life or personnel, are "defamatory" of prison personnel

or "magnify grievances" of inmates.

III. Written Statement of Reasons For Disapproval of Mail

When an inmate is prohibited from sending a letter, the letter and a written and signed notice stating the reason for disapproval will be given the inmate. If an inmate is prohibited from receiving a letter, a written and signed notice stating the reason for disapproval will be given the inmate and the sender, and the letter will be returned to the sender. In both instances, such notice shall not be a simple checklist but shall be an individual reason specifying the objectionable part or parts of the letter and explicitly stating why it is disapproved. Such notice shall also specify the procedure for appealing the disapproval in accordance with Rule (IV) below.

Copies of any material from letters, or the letters themselves, may not be placed in an inmate's file unless the contents are disapproved in accordance with Rule (I) above, and unless the inmate is accordingly notified in writing of such action as required above.

IV. Appeal of Decision Disapproving Mail

An inmate has a right to appeal disapproval of any outgoing or incoming letter. Any person whose letter to an inmate is disapproved also has a right to appeal. Each institution shall adopt detailed procedures

governing such appeals but, at a minimum, the appeal process shall include the following:

(1) The official to whom a disapproval may be appealed shall not have disapproved the letter in question and shall not have had any connection with or previous knowledge whatever of the disapproval.

(2) The inmate and, in the case of a disapproved incoming letter, the sender, shall have the right to appear before the official hearing the appeal and to have a reasonable opportunity to contest the decision disapproving the letter. Written notice of this right shall be given the inmate and the sender a reasonable time before the hearing.

(3) The decision on appeal shall be made in writing and shall specify the reasons therefor and the evidence relied upon. If the decision is adverse to the inmate or sender, the written decision shall be given to the inmate and sender and shall include instructions as to how an appeal may be taken directly to the Director.

Respectfully submitted,

WILLIAM BENNETT TURNER
Attorney for Plaintiffs

ORIGINAL
FILED

MAY 30, 1973

CLERK, U.S. DIST.
COURT, SAN FRANCISCO

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
)	
Plaintiffs,	)	CASE NO: C-71 543 ACW
vs.)	
	)	ORDER RE PROPOSED
RAYMOND K. PROCUNIER,	)	<u>NEW REGULATIONS</u>
et al.,)	
)	
Defendants.)	
_____)	

BEFORE: DUNIWAY, U. S. Circuit Judge; and
* ZIRPOLI and WOLLENBERG, U. S.
District Judges

After the filing of the Court's memorandum opinion in this case, now published at 354 F.Supp. 1092, defendants submitted a first set of proposed regulations. Plaintiff submitted many objections to the proposals, and the Court ordered that counsel for the parties confer to identify those issues upon

which substantial agreement exists, and those upon which the Court must rule. Defendants' proposed regulations (revised) were submitted on April 23, 1973. Plaintiff has submitted an additional memorandum setting forth his remaining objections, and offered an alternative set of proposals.

The Court, having reviewed defendants' proposed regulations submitted on April 23, 1973, and the objections thereto, hereby approves said regulations subject to the following limitations:

(1) The Court believes that in light of the present text of Rule 2401, to wit, "the sending and receiving of mail is a privilege, not a right . . ." defendants should adopt a statement summarizing the Court's holding in this case in lieu of Rule 2401. The Court suggests the following:

"Sending and receiving letters is not a privilege but is a right of inmates that cannot be interfered with except that a specific letter may be disapproved if its contents are in violation of the following rules."

(2) The Court is prepared to approve paragraph A(1), Criteria for Disapproval of Inmate Mail--Outgoing Letters, subject to the following modifications:

a. The present text of sub-paragraph (a) is vague and overbroad. This language must either be deleted entirely, or made specific. If defendants elect to retain this provision, an acceptable modification would be "The letter

contains threats which are themselves violations of criminal laws."

b. Use of the term "prohibited material" makes sub-paragraph (c) vague and overbroad. This language must be either deleted or modified. If defendants elect to retain this provision, an acceptable modification would substitute "physical contraband" for "prohibited material."

c. The prohibition contained in sub-paragraph (h) is unjustifiably narrow. The Court approves retention of sub-paragraph (h) provided the word "immediate" is deleted therefrom.

d. The Court finds that sub-paragraph (j) is subject to all of the constitutional deficiencies raised by the enjoined regulations. It must, therefore, be deleted in its entirety.

In addition to the specific objections set forth above, the Court finds that the intent of paragraph A(1) will be more clearly set forth by inserting the word "only" after the phrase "may be disapproved for mailing only if the content".

The Court similarly finds that the intent of paragraph 2, Incoming Letters, will be more clearly set forth by inserting the word "only" and deleting the words "any of", so that the paragraph reads: "Incoming letters to inmates may be disapproved for receipt only for the foregoing reasons, or^{1/} if the letter contains material"

^{1/} The word "or" has been inserted for grammatical clarity only.

The Court has no further objection to paragraph 2, provided that paragraph 3 is modified in the manner discussed below.

(3) Paragraph 3, Limitations, may be modified by omitting the first sentence in light of the Court's ruling that paragraph A(1) (j) must be deleted. The Court finds that the second sentence, which provides a limitation to the application of paragraph 2, must be substantially modified to comply with the Court's holding that regulations restricting First Amendment rights must be at least reasonably and necessarily related to a justifiable state interest. The Court finds no constitutional objection to paragraph 2, provided that the limitation in paragraph 3 is modified to comply with the standards set forth in the following language:

"Disapproval of a letter on the basis that it would cause severe psychiatric or emotional disturbance to the inmate will be done only by a licensed psychiatrist after consultation with the inmate's caseworker. The psychiatrist must find that the inmate's disturbance is likely to affect prison discipline or security, or the inmate's rehabilitation, and that there is no reasonable means of ameliorating the disturbance of the inmate without censoring the letter."

(4) The Court is prepared to approve paragraph 4 provided that the following modifications are made:

a. The qualifications "if appropriate", which appear twice, must be deleted. For purposes of grammatical clarity, the Court recommends the following language:

- "a. When an inmate is prohibited from sending a letter, the letter and a written and signed notice stating one of the authorized reasons for disapproval and, indicating the portion of the letter requiring disapproval will be given the inmate.
- b. If an inmate is prohibited from receiving a letter, a written and signed notice stating one of the authorized reasons for disapproval and indicating the portion of the letter requiring disapproval will be given the sender, and the letter will be returned to the sender. The inmate will be given notice in writing that a letter has been rejected, indicating one of the authorized reasons and the sender's name."

b. The provision implying that material from letters may be placed in an inmate's file is, on its face, overbroad in that it does not give the inmate any notice of what may be placed in his file or how it may be used. (See 354 F.Supp. at 1096) Nor is the inmate given an opportunity to contest the use of such material for disciplinary or other purposes. For these reasons, the threat of copying inmates letters for prison purposes constitutes an unjustified restriction on First Amendment rights.

The defects of overbreadth, lack of notice, and chilling effect inherent in defendants' proposal may be cured by the adoption of specific standards limiting the kinds of materials that may be placed in an inmate's file or used against him in disciplinary proceedings, plus an opportunity for the inmate

to contest such use of his correspondence. Inclusion of the following language would satisfy the Court's objections:

"c. Material from correspondence shall not be placed in an inmate's file unless it violates one of the provisions of paragraph 1. If copies of any material from letters are placed in an inmate's file, the inmate will be notified of the action in writing and given an opportunity to contest said action in the manner set forth in subparagraph (d)."

c. Defendants' Appendix to their proposed regulations indicates their intention to apply a general right to administrative review of inmate grievances to mail censorship decisions. A copy of "Proposed Rules and Regulations of the Director of Corrections, March 23, 1973 Draft" has been provided to the Court. Paragraph DP-1003 provides as follows:

"RIGHT TO ADMINISTRATIVE REVIEW OF GRIEVANCES

"Each inmate has the right to appeal decisions or conditions affecting his or her welfare. Each institution head must provide a system whereby an inmate may request and receive administrative review of any problem or complaint. Such review will involve upper level staff and will insure that the complaint receives timely, courteous and considerate attention. The institutional appeal procedure will apply to all areas of complaint except the disciplinary process and the Adult Authority hearing process, each of which has a special appeal or review procedure."

If Paragraph DP-1003 is incorporated in paragraph 4 of the new regulations,

whether by reference or otherwise, the defendant will have complied with the minimum standards set forth by the Court in its opinion. See 354 F.Supp. at 1097. The Court recommends that the relevant portions of DP-1003 be set out in sub-paragraph 4 (d).

Defendant's proposed regulation labeled "B. Investigators" must be modified as follows:

(1) Defendants' failure to include paraprofessionals constitutes an unreasonable restriction on inmates' right of access to the courts. No justification has been shown, and none occurs to the Court, for excluding a reasonably defined class of paraprofessionals. A satisfactory definition is included in the suggested language set out below.

(2) The term "attorney of record" should be defined. Incorporation of Proposed Rule DP-2705 (attached hereto as Appendix A) by reference would satisfy this requirement.

(3) Defendants' contemplation in the proposed regulation, and the form submitted in the appendix thereto, that attorneys using students or paraprofessionals as investigators must accept responsibility "for the student's compliance with public laws and with the rules of the institutions visited" or "for the conduct of investigators acting on his behalf" is a vague, overbroad threat. General principles of agency and vicarious liability for criminal actions of others will, of course, apply to investigators. But the defendants' use of language in the

proposed regulations and the appended form does more than state the relationship between the general body of law and prison regulations. If defendants elect to require that sponsoring attorneys accept responsibility for their agent in writing, then the extent of responsibility so accepted must be limited to responsibility for acts taken within the scope of the agency created.

The Court recommends that defendants' proposed regulation be modified to read as follows:

B. Investigators

Investigators for an attorney of record must be (1) licensed by the state, (2) must be members of the State Bar, (3) must be law students certified under the State Bar Rules for the Practical Training of Law Students and sponsored by the attorney of record, or (4) must be paraprofessionals who, for the purposes of this rule, are persons regularly employed by the attorney of record to do legal and quasi-legal research on a full-time basis. Designation must be in writing by the attorney of record. For the purposes of this rule, an "attorney of record" is defined in Department of Corrections Rule DP-2705. If it is proposed that a certified law student or paraprofessional serve as an investigator, the sponsoring attorney must complete and file an information form provided by the institution for the purpose of obtaining identifying information about the student or paraprofessional. Such form must be filed at least one week prior to the initial proposed confidential visit by the

law student or paraprofessional on behalf of the attorney. For each visit, the student or paraprofessional must present a letter signed by the sponsoring attorney of record naming the inmate or inmates to be interviewed by the student or paraprofessional, and the interviews will be limited to those inmates only. When a law student or paraprofessional has been properly authorized to act on behalf of an attorney, he will be granted the privileges of the attorney. The attorney must accept responsibility in writing for acts taken within the scope of the agency created. These rules do not apply to law student assistance programs operating pursuant to agreements between the Department of Corrections and various law schools. Such programs must be operated in accordance with the individual agreements.

Defendants shall have twenty (20) days to submit proposed regulations in accordance with this Order.

Dated: May 30, 1973

United States Circuit Judge

United States District Judge

United States District Judge

SUPREME COURT SUPPLEMENT TO APPENDIX
In the Supreme Court of the
United States

OCTOBER TERM, 1972

NO. 72-1465

Supreme Court, U. S.
FILED

SEP 12 1973

MICHAEL BORM, JR., CLERK

RAYMOND K. PROCUNIER, Director,
California Department of Corrections,
et al,

Appellants,

vs.

ROBERT MARTINEZ, et al,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA.

APPEAL DOCKETED April 28, 1973

PROBABLE JURISDICTION NOTED June 18, 1973.

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Attorney General of the State of
California

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Attorney General—Criminal Division

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Attorneys for Appellants.

DOCKET ENTRIES

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7/16/73	Defendants' Proposed Regulations (Second Revision), filed	194
7/18/73	Plaintiffs' Responses to Defendants' Proposed Regulations, filed	204
7/20/73	Order Approving Regulations and Vacating Stay, filed	211

EXHIBITS TO COMPLAINT

EXHIBIT A

FOLSOM STATE PRISON

Notice of Special Disposition - Inmate Mail

This Letter Is Returned for the Reason(s)

Checked Below:

- Not an approved correspondent. Submit CDC 105 if you desire to correspond. ___ Hold letter for approval of application.
- Full Mail Card, removal necessary before addition.
- Cannot go sealed, see Rule D-2404.
- This party has been removed from your approved list.
- Your quota of twenty (20) letters per month is exhausted.
- Improper stationary. ___ Write on one sheet, both sides.
- Put your correct name and number in upper left envelope corner.
- Put your name and number and the relationship of the person addressed on the underside of the flap. ___ Not approved.
- Not considered a business letter. ___ Needs official approval.
- Asking for money. ___ Cannot request sample items of free literature.
- Criticizing policy, rules or officials.
- Mentioning inmates by name or number or relating Institutional gossip or incidents.
- Write in English. Spanish permitted to parents and wives only.
- Cannot go registered or certified. (See Rule D-2402-10.)
- No legal documents may go to approved correspondents.
- Use stamped envelopes to pay for your postage, withdrawal slips for legal postage only.
- Funds in your trust account prohibit free mailing.

- Your quota of free mail for this month is exhausted.
- Cards cannot go postage-free or to non-approved correspondents.
- Hobby cards must be approved by Handicraft Manager.
-
-
-

This Letter Is Being Delivered to You, But the Following Special Instructions Must Be Followed or Future Mail May Be Returned.

- Not an approved correspondent. You may answer this one letter only if you submit your reply along with a completed CDC 105 requesting approval.
- Notify this party to use your correct number and/or address.
- Notify this party to place his name and return address on the envelope.
- Excessive lipstick smears. One print is enough.
-
-
-

Exhibit A is a form used to notify prisoners that their letters have been disapproved under the Rules complained of herein.

EXHIBIT B

CALIFORNIA MEDICAL FACILITY

G.C. HERRICK C/O WOOD, LEE B-36205
INMATE BEHAVIOR (Magnifying grievances)

D-1201 Tuesday, January 25, 1972 1:45 P.M.

At approximately 1:45 P.M. during a routine check of Inmates traveling in the Main Corridor, I found WOOD B-36205, to be carrying on his person, a hand written letter addressed to Dr. Ruddie and Dr. Lunde. Writers of these doctors are members of CMF staff. This letter consisting of three (3) pages, magnifying out of proportion the treatment and reason for such treatment that WOOD is currently receiving. The letter was placed in the Custody evidence locker.

G.C. HERRICK, Correctional Officer
Medium #211, Search and Escort Officer
1/73 Referred to La March Unit Lt,s court, per
Lt. J.L. Steele, 2/W Commander.

cm P-261 INMATE Canteen la March (C)MEDIUM

Exhibit B is a disciplinary report that a prisoner violated Rule 1201, Inmate Behavior by "magnifying grievances" in a letter.

EXHIBIT C

December 6th, 1971

American Civil Liberties Union
593 Market Street
San Francisco, California 94105

Dear Mr. Halvonik,

This is in reply to your letter of
11-29-71 concerning Cresencio Valdez.

I have personally returned letters to Valdez with "not approved for mailing" written on them. Some of my staff or I may have written "Racial Bullshit" across one letter as you claim. If we did, this is not professional and will not be done in the future, although this is apparently what the contents amounted to or it would not have been referred to in such manner.

Departmental and Institutional regulations do not permit inmates to write material that is discriminatory or derogatory towards individuals or races. Any such letters will be returned to Valdez in the future. The reason the letters were marked on was to prevent him from re-submitting them in their same content, as some inmates do over and over.

All Valdez has to do to get mail out to Mrs. Mason is to write letters of decent content. I am not aware that he has been denied the privilege of writing to her.

I trust this adequately answers the questions you raised.

Sincerely,

W.E. Craven
Warden

H.D. Morphis
Program Administrator

cc: Central File
AWC File
A/C File

Exhibit C is a letter to an attorney explaining why prison officials refused to mail a prisoner's letter.

EXHIBIT D

November 3, 1971

Ms. Alice Daniel
Legal Defense Fund
12 Geary Street
San Francisco, Ca., 94108

Dear Ms. Daniel: Re:

In response to your letter of October 29, re.
Inmate I submit the following:

1. Only one disciplinary report was submitted - that of June 23, 1971. It is now in the file, with evidence attached for the information of the Adult Authority;
2. No disciplinary action was taken against Inmate for writing his mother. However, because of what appears to be his propensity for falsification and half-truths, it certainly is our duty to call this kind of attitude to the attention of the Adult Authority; they may consider it a serious matter, or totally disregard it, which, of course, is their prerogative.

A copy of the letter in question is also in Inmate file, for the attention of the Adult Authority.

Sincerely yours,

L. S. NELSON,
Warden.

LSN:h

Exhibit D illustrates the referral of a prisoner's letter to the Adult Authority. The name of the prisoner, who is also discussed in Exhibit E, has been omitted, but will be furnished to the Court upon request. He is now on parole, although his release was postponed because of this letter.

EXHIBIT E

November 12, 1971

Miss Alice Daniel
Legal Defense Fund
12 Geary Street
San Francisco, Ca., 94108

Dear Miss Daniel: Re:

I am responding to your letter of November 3, 1971, in regard to the above-named inmates.

I have previously written you relative to Leroy Deary and have only this to add: was identified as "an aggressive, revolutionary leader," on the basis of a letter he wrote to his mother shortly after the incident on August 21, 1971. This letter apparently contained unfounded, vicious rumors about the incident; hence, for the safety of the institution and its personnel, was ordered confined. If the Adult Authority does not reinstate his parole in their hearings next week, his case will be reviewed on or about December 15, for consideration of release from the control unit, transfer, or other program.

(THE OMITTED PORTION OF THIS LETTER DISCUSSES A MATTER COMPLETELY UNRELATED TO THE SUBJECT OF THIS LAWSUIT.)

I wish that I had the time to review the cases of all men placed in segregated units. Unfortunately, because of press of correspondence concerning such cases, I am unable to do more than either refer for handling by members of my staff, or personally reply summarily.

Very truly yours,

L. S. NELSON,
Warden.

LSN:h

Exhibit E discusses a prisoner's assignment to segregation and loss of parole because of statements contained in a letter to his mother.

EXHIBIT F

Examiner - 6/27/71

30-DAY STAY

COURT RULE DOESN'T

AID CON -- YET

by Stephen Cook

The young black San Quentin inmate opened the door to the guard's office beside the tiers in B Section, the penitentiary's disciplinary quarters, and confronted prison justice.

There were four white faces, attached to coats and ties. One offered a tentative smile. The others were expressionless. One of them spoke:

"Sit down, please, Jones (not the inmate's true name). This is a disciplinary committee. You were referred here because on June 20, you were charged with violating Department of Corrections Rule D1201 - possessing and writing militant material, a letter."

The speaker was Prison Captain Donald Weber, chairman of the committee. Others in the room were Associate Warden John Apostol, Correctional Counselor Jerry Golden, and Dr. Luther Grider, a prison psychologist.

Panther Paper

Captain Weber told Jones that a guard had charged Jones with possessing and writing a letter which, it appeared, was intended for the editor of the Black Panther Newspaper.

Jones name was typed, but not signed, at the bottom of the offending letter, which referred to Warden Louis S. Nelson as "a fascist" and a "white racist pig" and boasted of the ease with which Black Panthers were able to attend recent Soul Day festivities at the prison by posing as entertainers.

"How do you plead - guilty or not guilty?" asked the captain.

Deprived of Rights

At this point, Jones was being deprived of his constitutional rights, according to a ruling this week by U.S. District Judge Alfonso J. Zirpoli.

The judge ruled Tuesday that San Quentin's disciplinary hearings are unconstitutional and permanently enjoined prison officials from conducting further hearings without safeguarding the rights of accused inmates.

Jones disciplinary hearing was conducted three days later, on Friday. Judge Zirpoli's order included a 30-day stay of execution to allow prison officials to appeal.

Rights

If he had been protected by the judge's ruling, Jones would have been entitled to adequate notice of the charge against him, the right to cross-examine the guard who charged him, the right to call favorable witnesses, the right to a lawyer or a lawyer substitute, the right to have his case heard by someone not involved in the incident, the right to a written finding of fact and the right to appeal.

As it was, Jones enjoyed only some of those rights.

He was allowed no counsel. The accusing guard was not present for cross-examination. Jones was allowed no witnesses on his own behalf. He was allowed only to speak for himself.

Jones pleaded not guilty. He admitted having the letter, but not writing it.

'Not Easy'

"It's not an easy question," said Associate Warden Apostol after the inmate had closed the door. "We're talking about a piece of paper."

"Jones is very convincing," said Weber. The captain also pointed out that Jones had been in isolation four days already, pending a hearing on the charge.

Dr. Grider suggested the sole issue before the committee was the "militancy" of the letter.

"Is it inflammatory? He called Warden Nelson a fascist. I don't think that's inflammatory, myself," said the psychologist.

"You don't think calling the warden a white racist pig is militant? I wouldn't want to be called that," said Weber.

"I think of violence as militant," said Apostol. "I guess someone's going to have to define the word militant. I can't get very excited about this letter."

"How much of this stuff do we close our eyes on," asked Golden. "This guy knows better. He's pretty bright. He could have said all that in the letter, but said it in a different way. He didn't have to call the warden a racist pig."

In the end, the committee deadlocked 2-2 with Golden and Weber holding for conviction.

Exhibit F is a newspaper account of a disciplinary proceeding against an inmate accused of "processing and writing militant material, a letter."

EXHIBIT G

February 17, 1972

Warden Louis S. Nelson
California State Prison
San Quentin, California 94964

Dear Mr. Nelson:

Robert Martinez, B-7417, has filed a complaint in the Federal District Court (C-71 543 ACW). Judge Wollenberg, to whom the case was assigned, has asked me to consider representing Mr. Martinez in his case. In order to evaluate the case properly and to obtain necessary information, a personal interview would be most helpful, and perhaps essential. Unfortunately my own schedule will not permit me to visit Mr. Martinez for quite some time. Therefore I request that you permit my assistant Joel Mark to interview him for me. Mr. Mark is a third year student at the Hastings School of Law. Thank you for your consideration in this matter.

Very truly yours,

Alice Daniel

AD:lj

EXHIBIT H

February 23, 1972

RE: MARTINEZ, Robert
B-7417

Miss Alice Daniel
Legal Defense Fund
12 Geary St.
San Francisco, Ca. 94108

Dear Miss Daniel:

Your letter of February 17, 1972, to Warden Nelson regarding the above named inmate and indicating you might be assigned his case by Judge Wolleberg has been referred to me for reply.

We could arrange an interview if advised that you had been assigned to this case in the usual manner and would do so at your convenience.

As to another person visiting in your behalf, this could not be arranged as our visiting arrangements for attorneys does not include this privilege at this institution.

Very truly yours,

L. S. NELSON, Warden

J. R. O'Brien
Information Officer

JRO'B:ajr

It was subsequently discovered that plaintiff MARTINEZ had been transferred to the Southern Conservation Center at Chino, California prior to the date of this letter, which San Quentin officials later explained had been sent without checking their files. The policy it expresses is of course equally applicable to plaintiff EARLEY.

EXHIBIT I

March 8, 1972

Lieutenant Ames
Rainbow Camp
Box 200, Route 2
Fallbrook, California 92028

Dear Lt. Ames:

Robert Martinez, B-7417, has filed a complaint in the Federal District Court (C-71 543 ACW). Judge Wollenberg asked me to consider representing Mr. Martinez in his case, and after writing to Mr. Martinez and discussing it with him on the telephone, I have agreed to do so.

At this point a personal interview would be most helpful, and perhaps essential in order to determine the relevant facts needed to file an amended complaint. Unfortunately the great distance between my office and your Camp makes it almost impossible for me to visit Mr. Martinez myself. Therefore I request that you permit my assistant Joel Mark to interview him for me. Mr. Mark is a third year student at the Hastings School of Law. If your rules do not permit student assistants to visit, it may be possible for me to arrange for another lawyer to visit Mr. Martinez in my place. Please advise me as soon as possible whether you will permit either a law student or another lawyer to interview Mr. Martinez for me. Thank you for your consideration in this matter.

Very truly yours,

Alice Daniel

AD:lj

180

EXHIBIT J

March 16, 1972

RE: MARTINEZ, Robert
OUR: B-7417

Legal Defense Fund
NAACP Legal Defense & Educational Fund, Inc.
12 Geary St.
San Francisco, California 94108

Attention: Alice Daniel

Your request regarding the personal interview of Robert Martinez by Mr. Mark cannot be approved under Departmental policy.

Only registered investigators or Attorneys are permitted.

If arrangements for another attorney are worked out by your office, it is suggested you contact Camp Rainbow regarding the date of your interview, as the Forestry Crews work six days a week and generally in remote sections of the county.

If alerted to the date of interview, Martinez will be maintained at the camp.

Respectfully,

R. D. Briggs
Program Administrator,
Camps

RDB:md

cc: Lt. Ames

EXHIBIT K

March 8, 1972

Warden Walter E. Craven
California State Prison
Represa, California 95671

Dear Mr. Craven:

I am the attorney of record for Robert Jordan in a case now pending in the California Supreme Court (#15734). Mr. Jordan has asked me to represent him in another matter as well. However a personal interview with him will be necessary in order to determine the facts of that case. Unfortunately my schedule will make it almost impossible for me to visit Mr. Jordan for quite some time. Therefore I request that you permit my assistant David Newman to interview him for me. Mr. Newman is a third year student at the Hastings School of Law. Thank you for your consideration in this matter.

Very truly yours,

Alice Daniel

AD:lj

Exhibits K and L pertain to a prisoner who is not a named plaintiff in this case, although he is a member of the class. They show that the statewide prohibition against para-professional visits is enforced at Folsom State Prison.

EXHIBIT L

March 13, 1972

Ms. Alice Daniel
Legal Defense Fund, NAACP
12 Geary Street
San Francisco, California 94108

Dear Ms. Daniel:

Subject: Robert Jordan, B-24196

The Warden has asked me to reply to your letter of March 8, 1972, concerning Mr. Robert Jordan.

I have checked with the Visitors Processing Office and find that at no time has Mr. Jordan filled out an Attorney of Record application designating you as his Attorney of Record. At this time he has a number of attorneys of record, but has never taken the necessary steps to include your name among them.

With regard to your request to have a law student represent you, as you know, it is against Departmental policy for anyone to conduct business with an inmate on behalf of an attorney of record, with the exception of a California State licensed investigator. This must be accomplished by means of a letter from the attorney of record, in advance of the investigator's visit, designating him as such in a letter addressed to the Warden. An attorney of record may designate not more than two investigators to represent him in dealing with an inmate.

Sincerely,

WALTER E. CRAVEN,
Warden

J. L. Moore, Warden's
Administrative Assist.

AFFIDAVITS IN SUPPORT
OF MOTION FOR
SUMMARY JUDGMENT

WILLIAM BENNETT TURNER	FILED:
LOWELL JOHNSTON	Dec. 1, 1972
JULIAN J. FOWLES	
12 Geary Street	
San Francisco, California 94108	
Telephone: (415) 788-8736	

ALICE DANIEL
Hastings College of the Law
University of California
198 McAllister Street
San Francisco, California 94102
Telephone: (415) 557-2131

MARIO OBLEDO
Mexican American Legal Defense
and Educational Fund, Inc.
145 Ninth Street
San Francisco, California 94102
Telephone: (415) 626-6196

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
	)	NO. C-71 543 ACW
Plaintiffs,)	
vs.)	
RAYMOND K. PROCUNIER,	)	AFFIDAVIT OF
et al.,	)	<u>ALICE DANIEL</u>
Defendants.)	

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO) ss.

ALICE DANIEL, being duly sworn, deposes
and says:

1. I am a member of the Bar of this Court. I am also a member of the Bar of the states of California and New York, several District Courts, several Circuit Courts of Appeals and the Supreme Court of the United States. I am Associate Professor of Law at Hastings College of the Law. From July, 1970, to July, 1972, I served as Assistant Counsel for the NAACP Legal Defense and Educational Fund, Inc., in San Francisco, California. Before that, I was a Teaching Assistant at Columbia Law School and worked three years in criminal appellate practice for the Legal Aid Society of New York.

2. In early 1972, I was requested by the Honorable Albert C. Wollenberg to consider representing plaintiff Martinez in this case. Mr. Martinez had filed his complaint pro se. I agreed to investigate the case and to consider representing Mr. Martinez if the case presented important issues. At the time, I was being assisted by Joel Mark, a third year student at Hastings College of the Law. I believed Mr. Mark to be an able law student and a person of good character. He was very helpful to me in doing legal and factual research and in generally performing duties under my supervision.

3. On February 17, 1972, I wrote to defendant Nelson, explaining that I had been asked to consider representing plaintiff Martinez and requesting permission for Mr.

Mark personally to interview Mr. Martinez. A true and correct copy of my letter to defendant Nelson is annexed as Exhibit G to the Amended Complaint.

4. I requested my law student assistant personally to interview plaintiff Martinez, because my own schedule made it very inconvenient to take the time to go to the prison for the purpose of a personal interview. Even though San Quentin was relatively close to San Francisco, as compared to other much more remote California prisons, it was my experience that trips to the prison involved a good deal of waiting, delay and a single interview could easily occupy most of a working day. Of course, interviews at more remote prisons, where substantial travel was necessary, involved very substantial amounts of time away from the office.

5. I was refused permission to have my law student assistant interview Mr. Martinez, based solely on the rule prohibiting interviews by non-licensed assistant to attorneys. Annexed as Exhibit H to the Amended Complaint is a true and correct copy of the prison officials' response to my request for an interview by my assistant.

6. When plaintiff Martinez was transferred to another institution, much more remote from San Francisco, I again sought permission to have my assistant interview Mr. Martinez. Annexed as Exhibit I to the Amended Complaint is a true and correct copy of

my letter requesting such permission. Again, permission was refused because of defendants' rule permitting only licensed investigators or attorneys to interview prisoners. A true and correct copy of the prison officials' response is annexed as Exhibit J to the Amended Complaint. Preparation of this case was hindered and delayed because "interviews" had to take place by mail, with numerous queries and responses, in order to obtain essential information.

7. In connection with another case, I also sought permission to have a law student assistant interview a prisoner for whom I was attorney of record. This time the assistant was David Newman, another third year student at Hastings College of the Law. Mr. Newman, like Mr. Mark, had been very helpful in assisting me with legal and factual research, and I believed him to be a person of good character. I wrote for permission to have Mr. Newman interview my client at Folsom Prison. A true and correct copy of my letter is annexed as Exhibit K to the Amended Complaint. Again, permission was refused on the basis of the rule prohibiting interviews by para-professional assistants to attorneys. A true and correct copy of the letter refusing permission is annexed as Exhibit L to the Amended Complaint.

8. It was my experience in handling California prisoners' cases that personal interviews were extremely important in eval-

uating a prisoner's case, in deciding whether to represent the prisoner and in preparing for litigation. However, because of the remoteness of California institutions from my office, and the amount of time consumed in traveling to and waiting at the institutions, I was reluctant personally to spend the amount of time necessary for personal interviews. I believe that law student assistants acting under my supervision and pursuant to my direction could have performed very valuable services to the prisoners and to me. The inability to make use of such law student assistants, because of the prison rule absolutely prohibiting prisoner interviews by them, worked real inconvenience and tended to discourage me from undertaking more prisoner cases. I received a very large number of pleas for assistance from California prisoners, and would have liked to have assisted more, but the inability to use para-professional assistants was a factor inhibiting greater representation of California prisoners.

9. While serving as Assistant Counsel for the NAACP Legal Defense Fund, I also had occasion to speak regularly with other attorneys whose organizations or practice permitted them to represent California prisoners on a non-compensated volunteer basis. The consensus was that the inability to use law students in screening

cases was a real handicap in effectively representing prisoners. Further, it was virtually impossible to persuade private attorneys to undertake representation of indigent prisoners. Besides the fact that such attorneys would not be compensated, the inordinate amount of time required to interview clients was a factor, I believe, in deterring greater representation of California prisoners.

10. I have had several conversations with student participants in prisoner legal assistance programs in California prisons carried on at Boalt Hall and the University of Santa Clara School of Law. Such students are permitted to participate in such programs without any academic or security clearance. As a general matter, these programs are supervised very loosely and only rarely does a particular attorney assume personal responsibility for overseeing the assistance given to each prisoner "client". On the other hand, regarding the law students I supervised the Rules for Practical Training of Law Students of the California State Bar were followed. Such rules require that a lawyer "supervise no more than ten students concurrently" and "assume personal responsibility for any work undertaken by the student while under his supervision."

ALICE DANIEL

Sworn to and subscribed before me,
this 29th day of November, 1972.

Notary Public

WILLIAM BENNETT TURNER FILED:
 LOWELL JOHNSTON Dec. 1, 1972
 JULIAN J. FOWLES
 12 Geary Street
 San Francisco, California 94108
 Telephone: (415) 788-8736

ALICE DANIEL
 Hastings College of the Law
 University of California
 198 McAllister Street
 San Francisco, California 94102
 Telephone: (415) 557-2131

MARIO OBLEDO
 Mexican-American Legal Defense
 and Educational Fund, Inc.
 145 Ninth Street
 San Francisco, California 94102
 Telephone: (415) 626-6196
 Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
Plaintiffs,	)	NO. C-71 543 ACW
)	
vs.	)	<u>AFFIDAVIT</u>
)	
RAYMOND K. PROCUNIER,)	
et al.,)	
Defendants.)	
)	
<hr/>		
STATE OF CALIFORNIA)	
COUNTY OF SOLANO	)	ss.

PAUL A. ELLIS, being duly sworn, deposes and says:

1. I am presently confined in the California correctional institution at Vacaville, California.

2. On September 13, 1972, I wrote a letter to William Holdsworth, a friend with whom I am permitted to correspond. In the letter I expressed some annoyance with the officials at this institution, who have returned letters to me because I have not used a particular kind of paper. It was and is my impression that the officials do not uniformly require the CDC-116 paper and that supplies of such paper are short.

3. A true copy of my letter to Mr. Holdsworth is annexed hereto as Exhibit A. I submitted the letter through normal prison channels for mailing, properly addressed and with proper arrangements for postage.

4. Shortly after submitting the letter, the letter was returned to me by the prison mailroom, accompanied by an institutional form stating that the letter had been rejected because it was deemed "offensive" by the officer in the mailroom. A true copy of the mailroom form is annexed hereto as Exhibit B.

PAUL A. ELLIS

Sworn to and subscribed before me,
this 10th day of November, 1972.

Notary Public

EXHIBIT A

Name Paul A. Ellis
 Box No..... 2000: L 169
 Date SEPTEMBER 13, 1972

Hi Bill:

Thanks for your letter of September 8, 1972. I received a notice from the mail room that it was okay to write to you.

Please do not send me anything. You don't owe me a thing. All I would appreciate that you do is to be sure you pay back Mildred and Mary -Okay.

I am very happy to hear that you are doing so good. I let the following people read your letter: Mr. Boldt, Mike & Bert, John D., Archie, Mark, Ed M. etc.

Yep, I sure do enjoy those picnic visits now. I get them with Mary, Lu & Idella, Mildred.

Thanks for the picture. Looks like you lost some weight???????

Who is your friend to the right????

Sounds like you are making good money. Are you living alone now or still living with a friend?

You are very optimistic about my board appearance. I will only be taking them a year and a half. They consider me a 'looser' so I will be here for quite some time. Besides how can they rehabilitate an innocent man. They got a big problem there.

Glen went out on parole. He stayed the first week with the Bunges. He is now an assistant manager of a store in San Jose. The Bunges went to visit him at work. He spends almost every weekend with them. They really took to each other. Jerry M. is doing okay now. Old Gus finally went out to San Francisco.

Ray W. at the Protestant Chapel got a date. Going home before Christmas. John D and Ray said to say hello.

After my postboard if I stay here or find out where I will be going I might let you get me a subscription to a PENTHOUSE. But let me find out first what is happening. If I get transferred they do not transfer the magazines and I would not get it.

You are doing great work in the L.A. area with kids. Did Mary tell you what pictures she loaned you that she did not have copies of. If so would you be sure to send her back copies (you could get them made). I don't want to lose our only copies.

Things haven't changed here much. The only great improvement for me is that I go outside the prison walls on my visits.

We still take the same old bull- from the cops and staff.

Twice this week I have gotten back letters from the mailroom because I did not use CDC 116 paper. Yet when I ask the wing bull for writing paper he hands me plain paper and tells me to put my own heading on it. Then I use it because I can't get the other stuff and get my letters back. I got one back that I sent Chuck, one to Mary and one to Luella and today one from Ellen. I paid a pack of cigs to get some CDC 116 from a guy that still had some so hope this makes them happy. I wish the State would buy some CDC paper so that we can have enough to mail our letters on. The most important thing we have is our correspondence and mail and they have to harass even that. I guess they get their kicks that way. But you should know you lived with it for years.

Any time you put human beings over other human beings with total POWER they become POWER MAD and sadistic. They will do anything to cause another human

being discomfort or frustration. Probably saves them the price of going to a cheap prostitute for their kicks.

Be sure in your talks to kids that you stress what BS they will have to take from the guards when they come into a place like this. IT IS PART OF THE PUNISHMENT.

I am thinking of writing to Faye Stender the civil rights lawyer to see if she can take a class action to stop the institution from holding up our mail for petty reasons.

Why does the high brass always put the most malicious people in places of responsibility?

It never seems to fail. They put the decent guys in the wings and the misfits in the mailroom or custody offices.

Well this is enough for the first letter.

Keep up the good work.

best wishes

POWER TO YOU BILL.....

Paul

P. S.

Is your phone number

213-469-3213

or

213-469-3219

EVELLE J. YOUNGER, Attorney General
 of the State of California
 EDWARD A. HINZ, JR., Chief Assistant
 Attorney General--Criminal Division
 DORIS H. MAIER, Assistant Attorney
 General--Writs Section
 JOHN T. MURPHY
 Deputy Attorney General
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Filed 7/16/73

600 State Building
 San Francisco, California 94102
 Telephone: 557-3628

Attorneys for Defendants

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
Plaintiffs,)	
vs.	)	No. C-71 543 ACW
RAYMOND K. PROCUNIER,	)	(Three-Judge Court)
et al.,)	
Defendants.)	
)	

PROPOSED REGULATIONS (Second Revision)

In accordance with this Court's order of May 30, 1973, the following new regulations of the Director of the Department of Corrections are submitted for the Court's approval:

CORRESPONDENCE

A. Criteria for Disapproval of Inmate Mail

1. Outgoing Letters

Outgoing letters from inmates of institutions not requiring approval of

inmate correspondents may be disapproved for mailing only if the content falls as a whole or in significant part into any of the following categories:

- a. The letter contains threats of physical harm against any person or threats of criminal activity.
- b. The letter threatens blackmail mail or extortion.
- c. The letter concerns sending contraband in or out of the institutions.
- d. The letter concerns plans to escape.
- e. The letter concerns plans for activities in violation of institutional rules.
- f. The letter concerns plans for criminal activity.
- g. The letter is in code and its contents are not understood by reader.
- h. The letter solicits gifts of goods or money from other than family.
- i. The letter is obscene.
- j. The letter contains information which if communicated would create a clear and present danger of violence and physical harm to a human being.

Outgoing letters from inmates of institutions requiring approval of correspondents may be disapproved only for the foregoing reasons, or if the addressee is not an approved correspondent of the inmate and special permission for the letter has not been obtained.

2. Incoming Letters

Incoming letters to inmates may be disapproved for receipt only for the foregoing reasons, or if the letter contains material which would cause severe psychiatric or emotional disturbance to the inmate, or in an institution requiring approval of inmate correspondents, is from a person who is not an approved correspondent and special permission for the letter has not been obtained.

3. Limitations

Disapproval of a letter on the basis that it would cause severe psychiatric or emotional disturbance to the inmate may be done only by a member of the institution's psychiatric staff after consultation with the inmate's caseworker. The staff member may disapprove the letter only upon a finding that receipt of the letter would be likely to affect

prison discipline or security or the inmate's rehabilitation, and that there is no reasonable alternative means of ameliorating the disturbance of the inmate.

Outgoing or incoming letters may not be rejected solely upon the ground that they contain criticism of the institution or its personnel.

4. Notice of Disapproval of Inmate Mail

- a. When an inmate is prohibited from sending a letter, the letter and a written and signed notice stating one of the authorized reasons for disapproval and indicating the portion or portions of the letter causing disapproval will be given the inmate.
- b. When an inmate is prohibited from receiving a letter, the letter and a written and signed notice stating one of the authorized reasons for disapproval and indicating the portion or portions of the letter causing disapproval will be given the sender. The inmate will be given notice in writing that a letter has been rejected, indicating one of the authorized reasons and the sender's name.

- c. Material from correspondence which violates the provisions of paragraph one may be placed in an inmate's file. Other material from correspondence may not be placed in an inmate's file unless it has been lawfully observed by an employee of the department and is relevant to assessment of the inmate's rehabilitation. However, such material which is not in violation of the provisions of paragraph one may not be the subject of disciplinary proceedings against an inmate. An inmate shall be notified in writing of the placing of any material from correspondence in his file.
- d. Administrative review of inmate grievances regarding the application of this rule may be had in accordance with paragraph DP-1003 of these rules.

B. Investigators

Investigators for an attorney of record must be (1) licensed by the State, (2) members of the State Bar, (3) law students certified under the State Bar Rules for the Practical Training of Law Students and sponsored by the Attorney of record, or (4) legal paraprofessionals certified by the State Bar

or other equivalent legal professional body and sponsored by the attorney of record. Authorization for an investigator to act for an attorney of record must be in writing and filed with the institution to be visited.

The provisions of Policy DP 2705 defining attorneys of record shall apply to this paragraph. If an investigator is to be a certified law student or certified legal paraprofessional, the sponsoring attorney must complete and file an information form provided by the institution for the purpose of obtaining identifying information about the student or paraprofessional. Such form must be filed at least one week prior to the initial proposed visit by the law student or legal paraprofessional on behalf of the attorney. For each visit, the law student or legal paraprofessional must present a letter signed by the sponsoring attorney of record naming the inmate or inmates to be interviewed by the student or paraprofessional, and the interviews may be limited to those inmates only. When a law student or legal paraprofessional has been properly authorized to act on behalf of an attorney, he will be granted the privileges of the attorney. The attorney must accept responsibility in writing for acts committed by the law student or legal paraprofessional in the course of acting on behalf of the attorney.

These rules do not apply to law student assistance programs operating pursuant to agreements between the Department of Corrections and law schools; such programs must be operated in accordance with the individual agreements.

DATED: July 16, 1973

EVELLE J. YOUNGER, Attorney General
of the State of California

EDWARD A. HINZ, JR., Chief Assistant
Attorney General--Criminal Division

DORIS H. MAIER, Assistant Attorney
General--Writs Section

JOHN T. MURPHY
Deputy Attorney General

THOMAS A. BRADY
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Attorneys for Defendants

EVELLE J. YOUNGER, Attorney General
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Attorneys for Defendants

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,)	
)	
Plaintiffs,)	
vs.	)	No. C-71 543 ACW
	)	(Three-Judge Court)
RAYMOND K. PROCUNIER,)	
et al.,)	
)	
Defendants.)	

APPENDIX

The following comments are submitted in explanation of the attached proposed regulations:

(1) Defendants submit that in light of the fact that former Rule 2401 has been completely eliminated from the Director's Rules, and the fact that the new rules permit disapproval of inmate mail only under the conditions specified therein, the right to receive and send other mail is stated with sufficient clarity.

(2) Defendants submit that the language of subparagraph 1(j) is necessary to prevent the transmission of information which, although it may not constitute a direct threat of physical harm to a person or of criminal activity, is of such a nature that it could lead to violence or physical harm if communicated to a third person. Examples of such information include the naming of informants or exhortation of others to criminal activity.

(3) Paragraph 4(c), dealing with the circumstances under which material from correspondence may be placed in an inmate's file attempts to delineate between correspondence which may be the subject of disciplinary proceeding and/or disapproval for transmission and correspondence which may not be the subject of such action. The latter category of correspondence includes "positive" correspondence, which may be indicative of the inmate's efforts at rehabilitation, such as attempts to find employment, or "neutral" material such as material indicating psychiatric disturbance which would be relevant to a medical diagnosis. Limitation of correspondence which may be placed in an inmate's file to material which may be the subject of disciplinary proceedings, would result in the exclusion of other material

which is relevant to the Department of Corrections broader function of rehabilitation of inmates assigned to it.

DATED: July 16, 1973

EVELLE J. YOUNGER, Attorney General
of the State of California

EDWARD A. HINZ, JR., Chief Assistant
Attorney General--Criminal Division

DORIS H. MAIER, Assistant Attorney
General--Writs Section

JOHN T. MURPHY
Deputy Attorney General

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FILED:
 July 18, 1973

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,	)	NO. C-71 543 ACW
Plaintiffs,	)	(Three-Judge Court)
vs.	)	PLAINTIFFS' RESPONSE
	)	TO DEFENDANTS' PRO-
RAYMOND K. PROCUNIER,	)	POSED REGULATIONS
et al.,	)	<u>(SECOND REVISION)</u>
Defendants.)	

Plaintiffs respond as follows to the
 Second Revision of defendants' proposed reg-
 ulations. Without waiving any of their pre-
 viously stated objections, plaintiffs here
 address only the points on which defendants'
 regulations are in conflict with the Court's
 order of May 30, 1973:

A. Criteria For Disapproval of Inmate Mail

1. Defendants have ignored the Court's direction that defendants adopt in a regulation a statement summarizing the Court's holding to the effect that correspondence is not a privilege but is a right (Order of May 30, p. 2). Defendants' Appendix to the Second Revision attempts to excuse this omission on the ground that Rule 2401 has been eliminated and that the new rules permit disapproval of inmate mail only under specified conditions. However, we believe that the Court's direction is sound and must be obeyed; because of the history of violation of First Amendment rights that gave rise to this lawsuit, an explicit direction to mailroom guards, rejecting the "privilege" approach, is clearly needed.

2. In paragraph A(1)(c), defendants have disregarded the Court's direction to substitute the phrase "physical contraband" (Order of May 30, p. 2). This omission is apparently designed to authorize the suppression of words which some mailroom guard may consider "contraband". This has been the previous approach of the Department of Corrections. Thus, in In re Jordan, 7 Cal. 3d 930, 500 P.2d 873 (1972), the Department argued that "verbal contraband" could be censored in attorney mail. But the California Supreme Court rejected the notion that words can in any way be considered contraband and

held that the term "contraband" must be limited to physical matter. We believe that the Court should adhere to its order. We believe that any legitimate security interests are more than adequately protected by the other provisions that the Court has approved. For example, if a letter concerned a plan for escape, defendants are authorized to suppress it by paragraph A(1)(d). Defendants have not attempted to explain why they have departed from the Court's direction, and there is no conceivable legitimate basis for their attempt to ban words as opposed to physical contraband.

3. In flagrant violation of the Court's order of May 30, defendants have included subparagraph (j) retaining the "clear and present danger" provision rejected by the Court. In their Appendix, they attempt to explain this by stating that under this provision they might prevent "naming of informants or exhortation of others to criminal activity." The latter is covered by the plain language of paragraph A(1)(f), so subparagraph (j) is superfluous for that purpose. It is difficult to imagine how the former--naming of informants--would arise. That is, defendants have not explained why or how or to whom an inmate might impermissibly name some informant in a letter. If in fact this would present a real danger to prison security, plaintiffs would not object to a pro-

vision explicitly stating that prisoners cannot name confidential informants in letters. In short, defendants have demonstrated no need whatever for the overbroad provision that they have submitted in violation of the Court's order.^{1/}

4. Regarding letters that might cause a psychiatric disturbance, instead of complying with the Court's explicit direction that disapproval be done by a "licensed psychiatrist," defendants have provided that this be done by a member of the institution's psychiatric staff. We do not know whether this means a psychiatrist or not. We respectfully suggest that the Court adhere to its plain direction that any such disapproval be done by a psychiatrist; no other person could conceivably be qualified to make such a determination.

5. In further violation of the Court's order of May 30, defendants have provided that mailroom guards can place material from correspondence in prisoners' files even though it does not violate any of the correspondence rules. Defendants propose to authorize placing material in files if a guard thinks it "is relevant to assessment of the inmate's rehabilitation." Their Appendix attempts to justify this serious departure

^{1/} Further, although defendants now include a clear and present danger provision, they have omitted from paragraph A(3) their previous limitation to the effect that this determination can only be made at the program administrator or higher level.

from the Court's order by alleging a begin purpose of including "positive" correspondence, and a purpose of including material indicating that the inmate may have a psychiatric disturbance. We submit that the Court should not permit this departure, because mailroom guards should not be authorized to determine what will or will not affect an inmate's "rehabilitation" or indicate "psychiatric disturbance". Reading the mail for these purposes, and building a dossier on the inmate as a result, is clearly inconsistent with everything the Court has said in this case. Accordingly, only the first sentence of paragraph A(4) (c) should be approved.

B. Investigators

1. In violation of the Court's order, which in the Court's explicit language defined paraprofessionals to be "persons regularly employed by the attorney of record to do legal and quasi-legal research on a full-time basis" (Order of May 30, p. 7), defendants require paraprofessionals to be "certified by the State Bar or other equivalent legal professional body." We are aware of no such certification process by the State Bar or by any other equivalent body. If there is none, and defendants have not informed us of any, their provision ingeniously results in barring all paraprofessionals. If there is one, it must comply

with the Court's order. We respectfully urge the Court to adhere to the language of its order.

2. Defendants have eliminated the word "confidential" regarding visits by law students and paraprofessionals on behalf of attorneys. The Court's order including this word was taken from defendants' original version. Defendants have not offered any explanation for dropping this word. It is possible that the later provision that the student or paraprofessional "will be granted the privileges of the attorney" includes confidential communication. But the omission of the word confidential from the earlier provision unnecessarily raises an ambiguity. Clearly, the communications by investigators acting on behalf of attorneys must be confidential. This is in accordance with California Evidence Code 952 and In re Jordan, supra. The Evidence Code defines "confidential communication" to include information communicated to "those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." This obviously includes investigators communicating with clients on behalf of the attorney or record. We urge the Court not to permit any ambiguity and to adhere to its (and

defendants') original language.

3. As a final departure from the Court's order, regarding the attorney's "responsibility" for investigators, defendants have disregarded the Court's standard of responsibility for "acts taken within the scope of the agency created" (Order of May 30, p. 7). Instead, defendants use the term "in the course of acting on behalf of the attorney." We do not know whether defendants mean something different from the Court. We urge that the Court adhere to its well-considered language in its order of May 30.

CONCLUSION

For the reasons stated, the Court should disapprove the second revision of defendants' regulations and require defendants to adopt and implement regulations explicitly following the Court's directions.

Respectfully submitted,

WILLIAM BENNETT TURNER
Attorney for Plaintiffs

ORIGINAL FILED:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

ROBERT MARTINEZ and)	
WAYNE EARLEY, et al.,	)	Case No. C-71 543 ACW
Plaintiffs,	)	(Three-Judge Court)
vs.	)	ORDER APPROVING
RAYMOND K. PROCUNIER,	)	REGULATIONS AND
et al.,	)	<u>VACATING STAY</u>
Defendants.)	

In accordance with this Court's Order of February 2, 1973, defendants have submitted proposed regulations covering the subjects of mail censorship and confidential visits with inmates by investigators on behalf of attorneys. The Court finds that the defendants' second revised proposals, filed July 16, 1973, are constitutional on their face. Accordingly, the injunction heretofore entered by this Court on February 2, 1973, and stayed on March 21, 1973, shall become effective on August 1, 1973. That injunction shall remain in full force and effect until such time as the regulations contained in defendants' second revised proposals are adopted and

fully implemented in all institutions under
defendants' jurisdiction.

IT IS SO ORDERED.

Dated: July 20, 1973

/s/ Ben C. Duniway

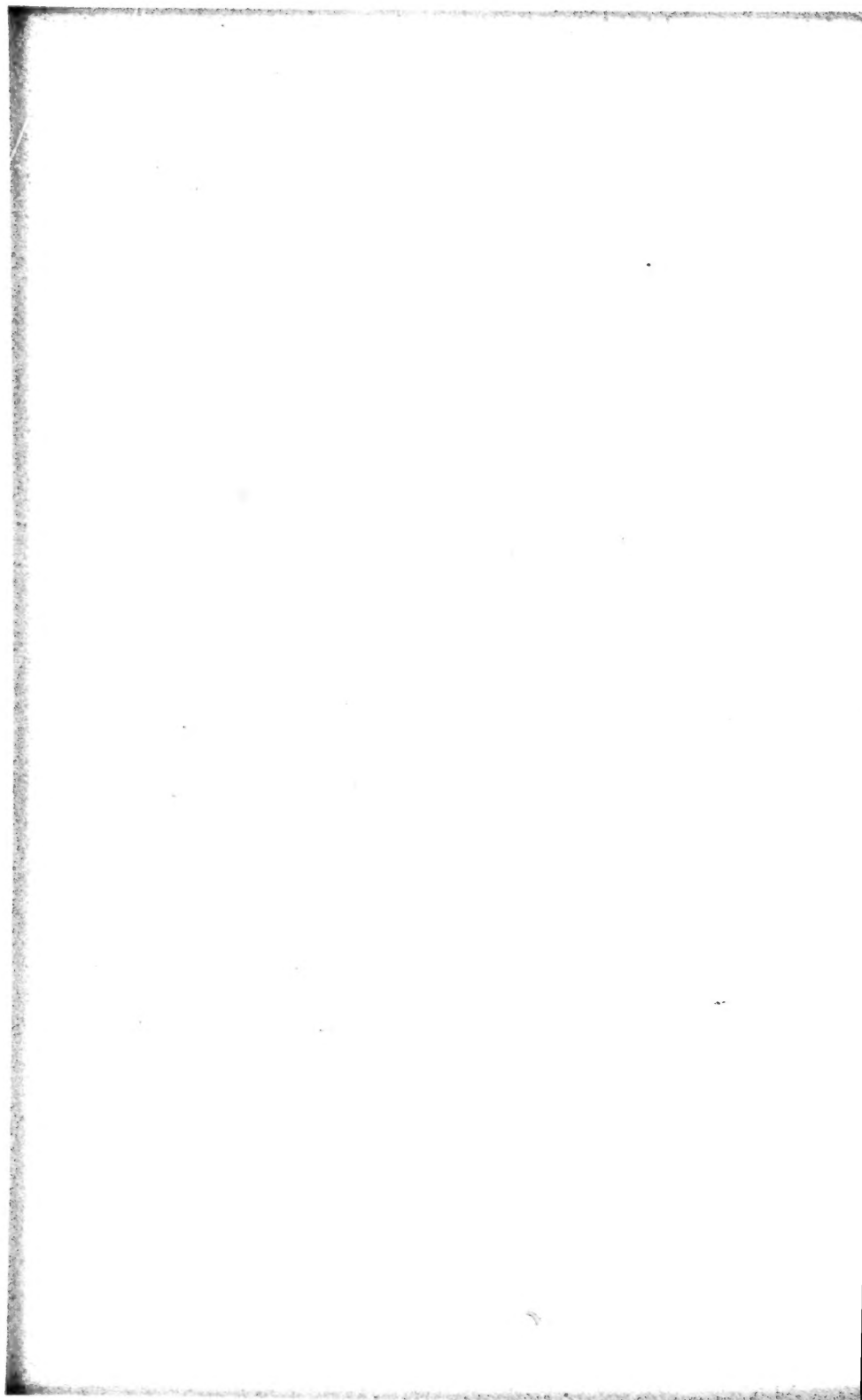
U. S. Circuit Judge

/s/ Alfonso J. Zirpoli

U. S. District Judge

/s/ Albert C. Wollenberg

U. S. District Judge



28 1973

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1972

No. 72 - 1465

RAYMOND K. PROCUNIER, Director, California
Department of Corrections, et al.,
Appellants,

VS.

ROBERT MARTINEZ, et al.,
Appellees.

On Appeal from the United States District Court
for the Northern District of California

JURISDICTIONAL STATEMENT

EVELLE J. YOUNGER,
Attorney General of the State of California,

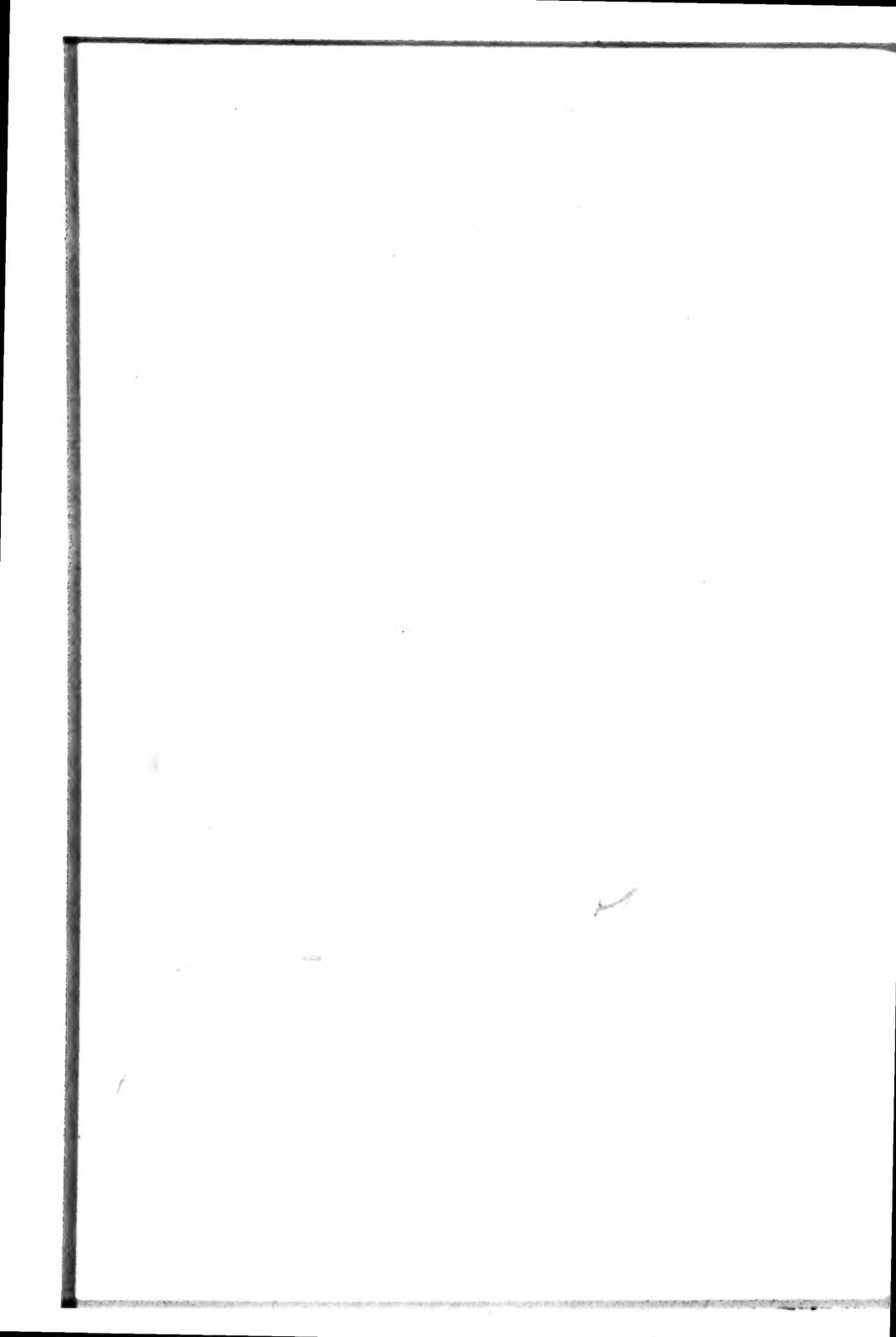
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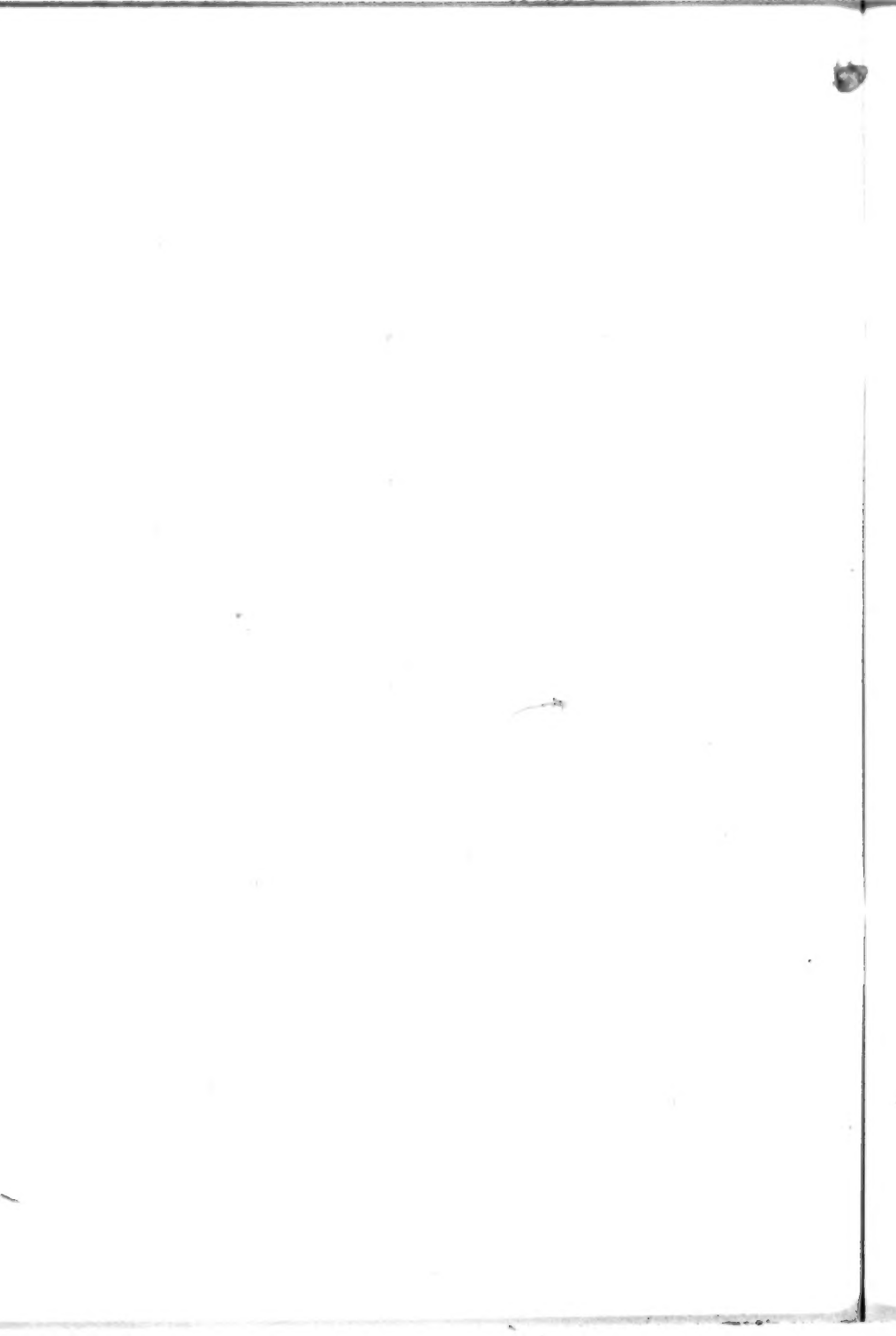
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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1972

No.

RAYMOND K. PROCUNIER, Director, California
Department of Corrections, et al.,
Appellants,

VS.

ROBERT MARTINEZ, et al.,
Appellees.

On Appeal from the United States District Court
for the Northern District of California

JURISDICTIONAL STATEMENT

This appeal is taken from the judgment of a three-judge panel of the United States District Court for the Northern District of California, entered on February 2, 1973, enjoining the enforcement of certain rules promulgated by appellant Procunier, Director of the California Department of Corrections; this statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the three-judge panel of the United States District Court for the Northern District of California has not yet been published in the official reports. A copy of the opinion is attached as Exhibit A.

JURISDICTION

This suit was brought as a class action on behalf of all inmates of penal institutions under the jurisdiction of the California Department of Corrections and its Director, defendant R. K. Procunier, under 42 U.S.C. section 1983, to enjoin the operation of certain rules promulgated by defendant Procunier, and for declaratory relief. The judgment of a three-judge panel of the district court was entered on February 2, 1973, and notice of appeal was filed in that court on March 1, 1973. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Younger v. Gilmore*, 404 U.S. 15 (1971); *Zemel v. Rusk*, 381 U.S. 1, 5-7 (1965).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to abstain from determining the constitutional validity of administrative rules promulgated by appellant, the

Director of the California Department of Corrections, when there existed a state statute, as yet uninterpreted, dealing with the subject matter covered by the rules and a means for state prisoners to judicially challenge the rules in question?

2. Whether the district court properly determined that institutional regulations dealing with general inmate correspondence, not including correspondence to and from attorneys, courts or public officials, may be subjected only to such regulations as are found by a federal court to be either "compelling" or "reasonable and necessary" to the advancement of some justifiable purpose of imprisonment?

3. Whether the constitution compels the State of California to accord to an unspecified class of non-attorneys acting on behalf of attorneys the full range of privileges accorded licensed attorneys in their meetings with their inmate-clients?

STATE PROVISIONS INVOLVED

The district court's opinion enjoined enforcement of sections 1201, 1205(e) and (f), and 2402(8) of the rules of the Director of Corrections, which are reprinted in footnotes 1-3 of the district court's opinion and the accompanying text. It also enjoined enforcement of Rule MV-IV-02 of the Director's Mail and Visiting Manual. This rule is reprinted at page xi of the opinion of the district court (see Exhibit A).

STATEMENT OF THE CASE

Appellees, on behalf of themselves and all other inmates at California penal institutions under the jurisdiction of the California Department of Corrections, filed an amended complaint in the United States District Court for the Northern District of California on July 6, 1972, challenging the constitutionality of certain regulations promulgated by Director Procunier. The amended complaint requested the convening of a three-judge court under the provisions of Title 28, United States Code, section 2281. This request was granted by Chief Judge Chambers of the Court of Appeals for the Ninth Circuit. Appellants then moved to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure. Appellees moved for a summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The motions were heard jointly and on February 2, 1973, the court issued an order denying appellants' motion to dismiss the complaint and partially granting appellees' motion for a summary judgment. This order enjoined enforcement of the above-mentioned regulations and directed appellants to formulate new regulations in their stead, subject to approval by the court, in accordance with the general guidance furnished in the court's opinion.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented herein are of importance to the administration of both the state prisons and the federal prison system. These questions concern the

instances in which a federal court may properly intervene in matters of state prison management and the proper application of the doctrine of abstention. Finally, there is the question of whether the Constitution compels the states to accord to persons other than attorneys the general right to confer confidentially with inmates in the same manner as attorneys, or whether the states retain the right to limit access to prisoners by private individuals.

ARGUMENT

I

THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM DECIDING THE CONSTITUTIONAL ISSUES.

The district court summarily rejected defendants' contention that the court should abstain from deciding the issues presented until the state courts had had an opportunity to pass on them. The district court apparently presumed that abstention would be proper only if the regulations themselves were unclear and could be authoritatively settled by a state court decision.

At all times here pertinent, there existed in California a statute dealing in some detail with the effect of a sentence of imprisonment in a state prison on the civil rights of a prisoner. This statute, California Penal Code section 2600, provides, *inter alia*:

"This section shall be construed so as not to deprive [an inmate] of the following civil rights, in accordance with the laws of this state:

... (4) To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office. Pursuant to the provisions of this section, prison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery."

California has, at all times here pertinent, allowed prisoners access to the courts by means of a petition for a writ of habeas corpus in order to assert rights relating to the conditions of confinement, in addition to challenging the fact of confinement. See *In re Harrell*, 2 Cal.3d 675, 87 Cal. Rptr. 504 (1970). Thus, in *In re Jordan*, 7 Cal.3d 930, 103 Cal. Rptr. 849 (1972), the state supreme court entertained, and granted, habeas corpus petitions by prisoners who challenged the Director's rules with respect to mail between inmates and their attorneys on the ground that they deprived petitioners of rights guaranteed them by California Penal Code section 2600.¹

The net result of the district court's refusal to abstain in the instant case is that, although the California legislature has enacted a statute specifically dealing with the rights and obligations of prison authorities and inmates with respect to correspondence

¹These same rules were challenged on constitutional grounds in the complaint filed in the instant case. However, the district court dismissed this challenge as moot because the intervening decision in *In re Jordan* granted appellees the relief they requested.

to and from an inmate, and although the legislature has created a means whereby a prisoner may seek interpretation or invalidation of the rules of the Director of Corrections seeking to interpret the statute, these processes will apparently never be used since a federal court has allowed petitioners herein to bypass these state mechanisms entirely, has adjudicated their constitutional claims regarding the rules without reference to the state statute, and has retained jurisdiction over the matter to compel appellants to formulate new rules solely in accordance with the court's opinion.

Under such circumstances, we submit that abstention by the federal court was required. Abstention is permissible only in narrowly limited special circumstances which justify the delay and expense which application of the doctrine may entail. *Zwickler v. Koota*, 389 U.S. 241, 248 (1967). However, "(t)he paradigm case for abstention arises when the challenged state statute is susceptible to 'a construction by the state courts that would avoid or modify the [federal] constitutional question.'" *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 510-511 (1972).

"Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions . . . and premature constitutional adjudication." *Harman v. Forssenius*, 380 U.S. 528, 534 (1965), cited with approval in *Lake Carriers' Assn. v. MacMullan*, *supra* at 511.

Here the state enacted a comprehensive statute dealing with the subject of correspondence to and from inmates of state penal institutions. Nonetheless, that statute was bypassed and the federal court interpreted rules promulgated by the Director of the Department of Corrections, within the scope of his authority (see Calif. Pen. Code § 5058), without reference to the fact that there existed a state statute, as yet uninterpreted, which sought to regulate this field. For these reasons, we submit that the instant case is such a paradigm for application of the doctrine of abstention as was envisioned by the decisions of this Court discussed above, and that the district court's failure to apply that doctrine herein resulted in a substantial breach of the salutary purposes of that doctrine.

II

THE DISTRICT COURT APPLIED IMPROPER STANDARDS IN DETERMINING THE PROPRIETY AND PERMISSIBLE SCOPE OF FEDERAL INTERVENTION.

The district court's opinion notes that there is conflict among the cases regarding the standard which a federal court must apply in determining whether a state statute or state prison regulation violates the First Amendment rights of prisoners (Op. Exhibit A, pp. vii-viii). The court's opinion disregards this Court's admonitions in *Lanza v. New York*, 370 U.S. 139, 143 (1962), and *Price v. Johnston*, 334 U.S. 266, 285 (1948), that lawful incarceration brings about the withdrawal or limitation of many of the rights and

privileges accorded a free man and that such limitations may be justified by the considerations underlying our penal system. It also disregards the many cases holding that prison authorities have wide discretion in matters of internal prison administration and that reasonable action within the scope of this discretion does not violate a prisoner's constitutional rights, see *e.g.*, *Smith v. Schneckloth*, 414 F.2d 680 (9th Cir. 1969), and this Court's admonition in *Johnson v. Avery*, 393 U.S. 483, 486 (1969), that federal intervention is authorized only when paramount federal constitutional rights supervene.

There is also some conflict as to whether any regulation of inmate mail is proper. The vast majority of the reported cases hold that restrictions on the extent and character of prisoners' correspondence and examination and censorship thereof are inherent incidents in the conduct of penal institutions. See *e.g.*, *Lee v. Tahash*, 352 F.2d 970, 971 (8th Cir. 1965); *Sostre v. McGinnis*, 442 F.2d 178, 199-201 (2d Cir. 1971), cert. denied, 404 U.S. 1049, and 405 U.S. 978. However, several recent cases have held that a state has no justifiable interest in censoring outgoing personal mail of inmates. *Guajardo v. McAdams*, 349 F.Supp. 211 (S.D. Tex. 1972); *Lamar v. Kern*, 340 F.Supp. 544 (W.D. Wis. 1972).

Thus, it appears that the lower federal courts at present hold widely diverging views regarding the scope and propriety of federal intervention in matters of internal prison regulation and, in particular, in the area of the limitations which a state may validly place

on non-legal mail to and from inmates. The district court's opinion herein notes two standards which the lower federal courts have applied in determining the propriety of state enactments. Other cases have employed various other balancing tests to determine whether such regulations are justified. See *e.g.*, *Seale v. Manson*, 326 F.Supp. 1375, 1383 (D. Conn. 1971); *Baker v. Beto*, 349 F.Supp. 1263 (S.D. Texas 1972). The net effect of these many cases and differing standards is, we submit, total confusion as to the scope of a prisoner's First Amendment rights with respect to "non-legal" correspondence, conflict as to the extent to which prison officials may regulate the inmates' correspondence, and conflict as to the circumstances when federal courts may intervene in such matters and the standards they should apply in measuring the validity of such prison regulations. Thus, the questions herein presented concerning these matters are substantial and of wide importance to the administration of both the federal and state prisons and the maintenance of harmonious federal-state relations.

III

THE CONSTITUTION DOES NOT COMPEL THE STATES TO ACCORD NON-ATTORNEYS THE RIGHT TO CONFER CONFIDENTIALLY WITH PRISON INMATES.

The district court also enjoined enforcement of a prison rule limiting investigators for an inmate's attorney of record to no more than two persons, who must themselves be either state licensed investigators or members of the bar and must be designated in writing as investigators by the attorney of record. Appellants were ordered to replace this rule with one which was "less restrictive" and were advised by the court that "bona fide law students under the supervision of attorneys, or full time lay employees of attorneys" would constitute a reasonable group of potential investigators.

The basis for this decision appears to be that the rule in question violates appellees' right of reasonable access to the courts, which is guaranteed as against state action by the Fourteenth Amendment. It is clear that the courts, state or federal, have no general obligation to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief. *Johnson v. Avery*, 393 U.S. 483, 488 (1969). The practice in most federal courts is to appoint counsel in post-conviction proceedings only after a petition for post-conviction relief passes initial judicial evaluation and the court determines that an evidentiary hearing is warranted. *Id.* at 487. Similarly, no general right exists for the appointment of counsel to represent an indigent in a civil case.

28 U.S.C. § 1915; *United States ex rel. Gardner v. Madden*, 352 F.2d 792 (9th Cir. 1965). However, it has long been recognized that prisoners, as well as other persons, have a right of reasonable access to the courts. *Ex parte Hull*, 312 U.S. 546, 549 (1941). The question here presented calls for this Court to define more precisely the concept "reasonable access to the courts."

The rule in question does not deny inmates access to their attorneys. Nor does it impair the confidential relationship between an attorney and his client. Nor does it attempt to deny attorneys the opportunity to use the services of non-attorneys to aid them in their work. Nonetheless, the district court concluded that the rule, although designed to prevent the abuses found to exist when confidential communication between inmates and non-attorneys was permitted, was unconstitutional since the court found that a "less restrictive" rule could be drawn which would nonetheless satisfy the prisons' security needs.

Whatever may be the merits generally of the use of law students and non-student legal assistants or "paraprofessionals" for the performance of some functions previously performed by attorneys only, we submit that the Constitution does not compel the California state prisons to recognize such persons as attorneys for purposes of allowing them confidential communication with inmates. The classes of attorneys and licensed private investigators, which were recognized by the previous rule, are easily defined and identifiable classes. Both are subject to detailed li-

censing and regulatory statutes of the State of California. By contrast, it must be said that the use of law students and "paraprofessionals" by attorneys is still in an early stage of development in this country. Indeed, no clear definition of these terms was attempted by the district court. Nonetheless, appellants have been ordered to open the class of persons allowed confidential interviews with inmates to include some unspecified number of such persons.

The basis of the court's holding appears to be that allowing of confidential interviews of inmates by such persons could or would benefit attorneys by freeing them from the necessity of interviewing their clients and allowing them to concentrate on legal research and drafting and might also allow them to serve more clients. We submit that an inmate's constitutional right of access to the courts does not demand that the legitimate requirements of institutional security be subordinated to the convenience of an attorney, especially when nothing prohibits that attorney from visiting and conferring with his client. We submit that the court's opinion departs from the correct definition of the term "reasonable access to the courts" and the correct standard to be applied in determining whether a particular prison regulation violates an inmate's right of reasonable access. Some years ago, another three-judge court, in an opinion which has been often cited in the intervening years, attempted to define the term "reasonable access to the courts" and the standard which a federal court must apply in determining whether this right has been violated:

"In the context of this case, access to the courts means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters. Whether or not in a particular case the access afforded is reasonable depends upon all the surrounding circumstances." *Hatfield v. Bailleaux*, 290 F.2d 632, 637 (9th Cir. 1961).

The court continued:

"In this federal proceeding under the Civil Rights Act we are not concerned with the question of whether these purposes for the challenged regulations are salutary or whether the regulations provide an effective means of achieving such purposes. See *Ex parte Hull*, 312 U.S. at page 549, 61 S. Ct. at page 641. If the purpose was not to hamper inmates in gaining reasonable access to the courts with regard to their respective criminal matters, and if the regulations and practices do not interfere with such reasonable access, our inquiry is at an end. The fact, if it be a fact, that access could have been further facilitated without impairing effective prison administration is likewise immaterial.

"This accords with the general principle that apart from due process considerations, the federal courts have no power to control or supervise state prison regulations and practices." *Id.* at 639-640 (footnote omitted).

Appellants respectfully urge this Court to adopt this approach.

Dated, San Francisco, California,

April 26, 1973.

Respectfully submitted,

EVELLE J. YOUNGER,

Attorney General of the State of California,

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Deputy Attorney General,

THOMAS A. BRADY,

Deputy Attorney General,

Attorneys for Appellants.

(Exhibit A Follows)

Exhibit A

Exhibit A

In the United States District Court for the
Northern District of California

CASE NO. C-71 543 ACW

Robert Martinez and Wayne Earley, et al.,	} Plaintiffs,
vs.	
Raymond K. Procunier, et al.,	
	Defendants.

[Filed February 2, 1973]

**MEMORANDUM OPINION DENYING
DEFENDANTS' MOTION TO DISMISS
AND PARTIALLY GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

**Before: Duniway, U. S. Circuit Judge; and Zirpoli
and Wollenberg, U. S. District Judges**

This suit is a class action brought on behalf of all inmates of penal institutions under the jurisdiction of the California Department of Corrections [CDC], challenging certain rules of statewide application relating to mail censorship and attorney-client interviews conducted by law students or other paraprofessionals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1343(3), 1343(4), 2201 and

2281, and 42 U.S.C. §1983. Plaintiffs seek declaratory and injunctive relief.

The action is presently before the Court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted and plaintiffs' motion for summary judgment. The record before the Court consists of the amended complaint, the moving papers of the parties, affidavits, depositions, interrogatories and admissions.

The amended complaint sets forth five separate claims for relief. Count I alleges that Director's Rules 1201, 1205(d) and (f), and 2402(8) violate the First and Fourteenth Amendments to the United States Constitution insofar as they restrict the permissible content of inmates letters to personal correspondents. Count II alleges that the rules set forth in Count I and §MV-I-02 of the Director's Mail and Visiting Manual violate the First, Sixth and Fourteenth Amendments as applied to correspondence between inmates and their attorneys. Count III alleges that Rule MV-IV-02 of the Director's Mail and Visiting Manual violates the Fifth and Fourteenth Amendments by permitting only licensed private investigators and members of the State Bar to interview inmates on behalf of the attorney of record. Count IV alleges that Rule 2402(10) which requires that an inmate obtain permission before sending registered or certified mail violates the First and Fourteenth Amendments. Count V raises an individual claim, alleging abuse of Rule 2402(13) in that plaintiff Martinez was not permitted to correspond with

his former co-defendant in order to secure an affidavit he hoped to use in challenging his conviction. The rule itself is not challenged.

Two counts of the complaint need not be considered by this Court. Count V deals only with an alleged abuse in the application of a director's rule; it does not question the validity of the rule itself. Accordingly, the issue is one that should be dealt with by a single judge district court. The second count this Court need not consider is Count IV. At oral argument the Court was informed by counsel for defendants that Director's Rule 2402(10) will be completely omitted from forthcoming revised regulations, and once these regulations are adopted the prisons will not restrict the use of registered and certified mail by prisoners. On the ground that this issue will soon be mooted, defendants asked that the Court not rule upon the validity of the present regulation. The Court, therefore, does not reach this question.

DEFENDANTS' MOTION TO DISMISS

In addition to the somewhat more specific arguments addressed to each count of the complaint, defendants raise two basic contentions in support of their motion to dismiss. First, they contend that the claims raised in the complaint involve questions of internal prison administration over which correctional authorities traditionally have wide discretion. *Smith v. Schneckloth*, 414 F.2d 680, 681 (9th Cir. 1969). The Supreme Court responded to a similar contention in *Johnson v. Avery*, 393 U.S. 483, 486 (1969):

“There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated.”

Accord, Cruz v. Beto, 405 U.S. 319, 321 (1972). Hence, in alleging violations of inmates rights under the First, Fifth and Fourteenth Amendments, plaintiffs have stated a claim that this Court must consider.

Defendants' second contention is that even if jurisdiction is proper and a claim cognizable in federal court has been alleged, the Court should nevertheless abstain. Defendants admit that exhaustion of state remedies is not required under 42 U.S.C. §1983, but suggests that since equitable relief has been requested, the Court should defer to the California courts on the basis of comity. *Reetz v. Bozanich*, 397 U.S. 82 (1970).

In *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509-10 (1972), the Supreme Court, as it had done before, specifically rejected the argument that the possibility a state court suit might result in a law being declared unconstitutional is not grounds for abstaining. Rather, abstention is proper only in the “narrowly limited ‘special circumstances’” that exist when the state law could be interpreted in a manner that would render it constitutional. *Id., Zwickler v. Koota*, 389 U.S. 241, 248 (1971). “Where there is no

ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971).

Finally, defendants argue that regardless of the validity of the motion to dismiss the other claims, Count II must be dismissed, because the question raised was resolved in *In re Jordan*, 7 Cal. 3d 930, 103 Cal. Rptr. 849 (1972). The question raised is, as defendants argue, now moot, and defendants' motion to dismiss Count II is, therefore, GRANTED.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT: COUNT I

Plaintiffs challenge the following Director's Rules as infringing on their freedom of speech: Rule 1201 directs inmates not to "agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence."¹ Rules 1205 (d) and (f) define contraband, as "any writings . . . expressing inflammatory political, racial, religious, or other views or beliefs. . . . which if circulated among other inmates, would in the judgment of the warden or superintendent tend to subvert prison order or discipline."² Rule 2402(8)

¹D1201. INMATE BEHAVIOR. Always conduct yourself in an orderly manner. Do not fight or take part in horseplay or physical encounters except as part of the regular athletic program. Do not agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence.

²Rule D1205, Contraband, is revised as follows: . . . d. Any writings or voice recordings expressing inflammatory political, racial, religious or other views or beliefs when not in the immediate possession of the originator, or when the originator's

provides that inmates "may not send or receive letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate."³

These rules implement CDC's general policy towards prisoner mail, which is set forth in Rule 2401:

"The sending and receiving of mail is a privilege, not a right, and any violation of the rules governing mail privileges either by you or by your correspondents may cause suspension of the mail privileges."

The rules are enforced by mailroom staff and other employees of the prison who routinely read incoming and outgoing "personal"⁴ mail of prisoners.

No standards, other than those contained in the rules set forth above, are furnished to the mailroom staff to help them decide whether a particular letter violates any prison rule or policy. If a letter is found

possession is used to subvert prison discipline by display or circulation. . . .

f. Any writings or voice recordings constituting escape plans or plans for the production or acquisition of explosives or arms, possession of which is forbidden by law to inmates of institutions under the control of the Department of Corrections. Such material as may be contained in books, magazines, or newspapers which have been previously approved for receipt by inmates is excepted.

There is some indication that the definition of contraband will be changed in revised regulations to emphasize the purpose for which an item may be used, such as a weapon or escape plan, instead of retaining the present general description. See Procunier Deposition at 12.

³Rule 2402(8) has been altered since the amended complaint was filed. The present prohibition against "foreign matter" replaces a prohibition against "prison gossip or discussion of other inmates."

⁴For purposes of this opinion, "personal" mail is defined to be all mail other than correspondence with "any member of the State Bar, or holder of public office". Cal. Penal Code §2600(2).

to be improper correspondence, a CDC employee may take one or more of the following actions: (a) he may refuse to mail the letter and return it to the prisoner; (b) he may submit a disciplinary report, which may lead to suspension of the prisoner's mail privileges or to other, possibly more severe disciplinary punishment; or, (c) he may photocopy the letter and place it in the prisoner's permanent file where it will be available to classification committees, which determine housing and work assignments, and to the Adult Authority, which sets a date for the prisoner's parole eligibility.

Plaintiffs raise several challenges to these regulations, all based on the First Amendment. Before discussing them, however, it is appropriate to examine the applicability of First Amendment rights to prison inmates in more general terms. The majority of recent cases treating the problem have adopted the formulation of the court in *Corothers v. Follette*, 314 F.Supp. 1014, 1024 (S.D.N.Y. 1970): "[A]ny prison regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably [citations omitted] and necessarily [citations omitted] to the advancement of some justifiable purpose of imprisonment." See *Gray v. Creamer*, 465 F.2d 179, 186 (3d Cir. 1972); *Wilkinson v. Skinner*, 462 F.2d 670, 671 (2d Cir. 1972); *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969); *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968); *Gates v.*

Collier, 349 F.Supp. 881, 896 (N.D. Miss. 1972); *Palmigiano v. Travisono*, 317 F.Supp. 776, 785 (D. R.I. 1970); cf., *Guajardo v. McAdams*, 349 F.Supp. 211 (S.D. Tex. 1972); *Brenneman v. Madigan*, 343 F.Supp. 128, 141-42 (N.D. Cal. 1972); *Burnham v. Oswald*, 342 F.Supp. 880 (W.D. N.Y. 1972); *Hillery v. Proconier*, F.Supp. C-71 2150 SW (N.D. Cal. 1972) (judgment vacated and temporary restraining order granted pending decision by three-judge court October 31, 1972); *Note: Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87 (1971). A few courts have required that the state show a compelling interest. See, e.g., *Morales v. Schmidt*, 340 F.Supp. 544 (W.D. Wis. 1972); *Fortune Society v. McGinnis*, 319 F.Supp. 901 (S.D. N.Y. 1970). But see *Baker v. Beto*, 349 F.Supp. 1263 (S.D. Tex. 1972). This Court need not decide between the "compelling" and "reasonable and necessary" tests since it holds that the regulations in question violate the First Amendment under either standard.

Plaintiffs correctly assert that the regulations in question are deficient in several respects. The regulations permit consorting of lawful expressions without any apparent justification. Phrases such as "defamatory", "otherwise inappropriate", "unduly complain", and "magnify grievances", include writings which are not obscene and do not present a clear and present danger to any justifiable state interest. Such writings are, therefore, protected by the First Amendment. No conceivable justification on the grounds of prison security necessarily requires such broad for-

mulation of censorship standards. Nor does it appear that defendant's legitimate interest in preserving internal discipline is served by applying these criteria to incoming mail.⁵

Moreover, assuming that the requirements of prison security justify censoring outgoing mail in some circumstances,⁶ the regulations in question here are both vague and overbroad. Legitimate communications, though personally offensive to prison staff could be—and have been—censored on the grounds that statements in letters were “defamatory”, or “otherwise inappropriate”, or that they constitute undue complaints or magnified grievances. If censorship of outgoing personal mail is to continue, the regulations must be more narrowly and specifically drawn to prohibit only such communications as are obscene, and therefore not protected by the First Amendment, or as constitute a clear and present danger to the institution of its rehabilitation programs. Statements critical of prison life and personnel cannot be subject to censorship by the very people who are being criticized simply to stifle such criticism.

⁵Defendant does not raise other potential justifications based on the recognized functions of prisons in America—deterrence of the individual and others from committing criminal acts, and rehabilitation of the individual. See *Morales v. Schmidt*, *supra*, 340 F.Supp. at 550. Such an argument would be futile, in any event, since the regulations in question would not appear necessary to further any of these functions.

⁶*Guajardo v. McAdams*, 349 F.Supp. 211 (S.D. Tex. 1972); *Lamar v. Kern*, 349 F.Supp. 222 (S.D. Tex. 1972); and *Morales v. Schmidt*, 340 F.Supp. 544 (W.D. Wis. 1972), have held that the state has no justifiable interest in censoring outgoing personal mail of inmates.

Plaintiffs further contend that the regulations in question are unconstitutional because they authorize punishment without giving "fair notice" of what is prohibited. See *Landman v. Royster*, 333 F.Supp. 621, 654-56 (E.D. Va. 1971). The punishment involved may include suspension of the right to send and receive personal mail, loss of privileges, or even a term in solitary confinement. The Court agrees with this contention as well.

Plaintiffs' final contention is that the Director's Rules do not provide any procedural safeguards against violation of prisoners' First Amendment rights through error or arbitrariness in censoring mail. The absence of safeguards undoubtedly stems from the premise of the mail regulations—mail is a privilege, not a fundamental right. Since we hold that prisoners' rights to correspond is a fundamental right protected by the First Amendment, and that restrictions on that right must be at least reasonably and necessarily related to a valid institutional interest, it follows that any regulations restricting prisoners' mail must be accompanied by the opportunity for review of decisions to censor or withhold mail. See *Guajardo v. McAdams*, *supra*. Without limiting the scope of such regulations, the following should, at a minimum, be provided for: (1) notice to the inmate that a letter has been disapproved, whether the letter be incoming or outgoing; (2) a reasonable opportunity for the inmate to contest a decision disapproving of an outgoing letter, and for an inmate's correspondent to contest a similar decision on an in-

coming letter; (3) review of complaints arising from censorship by an official of the prison other than the person who initially decided to disapprove a letter.

COUNT III

Administrative Rule MV-IV-02 provides in pertinent part:

Investigators for an attorney-of-record will be confined to not more than two. Such investigators must be licensed by the State or must be members of the State Bar. Designation must be made in writing by the Attorney.

Plaintiffs contend that this regulation effectively impedes access to the courts by imposing an unnecessary burden on prison inmates who cannot afford to pay for the services of licensed private investigators or attorneys. Most inmates are indigent and cannot even afford to pay their attorneys of record.⁷ Yet interviewing inmates is frequently an essential part of understanding the basis for a civil rights complaint, a habeas corpus petition, or an appeal. *Stevenson v. Mancusi*, 325 F.Supp. 1028, 1032 (W.D.N.Y. 1971). If attorneys of record must interview their clients personally at the many CDC institutions, the time

⁷"While the demand for legal counsel in prison is heavy, the supply is light. For private matters of a civil nature, legal counsel for the indigent in prison is almost nonexistent. Even for criminal proceedings, it is sparse." *Johnson v. Avery*, 393 U.S. 483, 493 (1969) (Douglas, J., concurring) (footnote omitted). Cf. *In re Tucker*, 5 Cal. 3d 171, 183 (1971); Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 493 (1970).

spent travelling would necessarily prohibit them from spending as much time working on legal problems.

Conversely, if attorneys can send assistants with detailed instructions to interview inmates, they will have more time available to evaluate the contentions raised and prepare the necessary legal documents. It follows that each inmate-client will receive better legal assistance, thus facilitating his access to the courts. Moreover, attorneys would have more time to serve additional clients who might otherwise have to rely on jailhouse lawyers.

The potential benefits to inmates, attorneys and the courts from permitting attorneys to send law students or other paraprofessionals to interview inmates are obvious. The use of paraprofessionals throughout the profession is becoming recognized as a means of improving legal services. The American Bar Association for example, recognizes such procedures in its new Code of Professional Responsibility.⁸

The fact that use of paraprofessionals would be beneficial, and perhaps essential in the prison context, to assuring an inmate reasonable access to the courts does not, however, provide a sufficient understanding of the problem to determine whether MV-IV-02 is constitutional. This Court has expressed the view

⁸"A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently." Canon 3, Ethical Considerations 3-6. See also Brickman, *Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism*, 71 Colum.L.Rev. 1153 (1971).

that "prison rules must pass the basic test of due process reasonability, with that test being more or less stringent according to the character of the right taken from the prisoner." *Gilmore v. Lynch*, 319 F. Supp. 105, 109 n.6 (N.D. Cal. 1970), *aff'd sub nom*, *Younger v. Gilmore*, 404 U.S. 15 (1971). The Supreme Court of California has similarly held that "the proper determination of [whether a given restriction is constitutional] in a particular case requires that we measure the *extent* of the restriction against the *need* for restriction." *In re Harrell*, 2 Cal.3d 675, 686 (1970). Factual criteria to be examined in making this determination are (1) the extent to which application of the rule impedes access to the court; (2) the extent of the threat presented by the conduct sought to be avoided by the particular rule from the standpoint of legitimate custodial objectives, and (3) the existence of reasonable alternative means of limiting the undesirable conduct which do not entail so significant a restriction on access to the courts. *In re Harrell*, *supra*.

The uncontested affidavit of Alice Daniel establishes that rule MV-IV-02 and the remoteness of most CDC institutions makes personal visits to inmate-clients so time consuming and inconvenient that attorneys are reluctant to make such visits. Inability to interview a client conveniently may affect an attorney's decision not to take the case, especially if the inmate is indigent and cannot pay for the attorney's expenses or time in making personal visits. When such a decision occurs, the inmate's ability to present

his case to the court necessarily suffers substantially from the absence of professional representation.

The conduct sought to be avoided by the adoption of MV-IV-02 in the fall of 1971 was visits to inmates by unlicensed investigators who posed a threat to prison security. Director Procunier testified in his deposition that "the real threat to security was that we were having visits from any one attorney [sic] that designated some people that we chose not to have in our institutions. That was generally the cause we found, that with some firms, they would designate anybody to be an investigator to get them in, people that we wouldn't allow in the institutions, so we tried to correct that and still be reasonable. The only way we could control it in my judgment would be to have them be licensed investigators." (Procunier Deposition, 24-25)

The Director's interest in preventing "undesirable" people from visiting inmates appears to be a reasonable concern for preserving prison security. But the means chosen to protect that interest are overbroad. In the present case, Ms. Daniel attempted to have a Hastings law student interview her client on her behalf, but was refused permission. Had the law student been participating in any of a number of law school programs under which students help inmates with their legal problems, instead of assisting a practicing attorney, he would have been permitted to interview the plaintiff. Moreover, he would not have undergone a security check other than to assure that he was enrolled in a school program.

In view of CDC's ability to satisfy security needs and still allow many law students access to inmates, it is apparent that a less restrictive regulation can be drawn to govern attorneys' use of law students or other paraprofessionals. Without intending to limit the Department's ability to experiment, the Court might suggest that bona fide law students under the supervision of attorneys, or full time lay employees of attorneys would constitute a reasonable group of potential investigators.

JUDGMENT

In accordance with Rule 56, Federal Rules of Civil Procedure, the Court adopts the foregoing opinion as its findings of fact and conclusions of law. It is the judgment of this Court that CDC Director's Rules 1201, 1205(d) and (f) and 2402(8) violate the First and Fourteenth Amendments to the Constitution. Rule MV-IV-02 violates the Fifth and Fourteenth Amendments. The Court therefore enjoins enforcement of these regulations insofar as they pertain to inmate mail and investigative interviews with qualified assistants of licensed attorneys.

The Court further orders that the defendants formulate new regulations in accordance with this opinion, and serve said regulations on plaintiffs' counsel and file them with the Court on or before March 1, 1973. Plaintiffs shall have until March 15, 1973 to respond to the proposed new regulations. The Court reserves jurisdiction of this lawsuit until properly formulated regulations have been adopted.

It is further ordered that Count II is dismissed as moot, and Count V be remanded to a single judge of this Court.

/s/ Ben C. Duniway
U. S. Circuit Judge

/s/ Albert C. Wollenberg
U. S. District Judge

/s/ Alfonso J. Zirpoli
U. S. District Judge



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**In the Supreme Court
OF THE
United States**

OCTOBER TERM, 1972

No. 72-1465

**RAYMOND K. PROCUNIER, Director,
California Department of Corrections, et al.,
*Appellants,***

VS.

**ROBERT MARTINEZ, et al.,
*Appellees.***

**On Appeal from the United States District Court
for the Northern District of California**

APPELLANTS' BRIEF

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In the Supreme Court

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OCTOBER TERM, 1972

No. 72-1465

RAYMOND K. PROCUNIER, Director,
California Department of Corrections, et al.,
Appellants,

VS.

ROBERT MARTINEZ, et al.,
Appellees.

On Appeal from the United States District Court
for the Northern District of California

APPELLANTS' BRIEF

OPINION BELOW

The opinion of the three-judge panel of the United States District Court for the Northern District of California (Exhibit A to the Jurisdictional Statement filed herein), is reported at 354 F.Supp. 1092.

JURISDICTION

The judgment of the three-judge panel was entered on February 2, 1973. Notice of appeal was filed on

March 1, 1973. The appeal was docketed on April 28, 1973. This court noted probable jurisdiction on June 18, 1973. The jurisdiction of the Supreme Court to review the judgment of the court below on direct appeal is conferred by Title 28, United States Code, section 1253.

QUESTIONS PRESENTED

1. Did the district court err in refusing to abstain from determining the constitutional validity of administrative rules promulgated by appellant, the Director of the California Department of Corrections, when the regulations themselves were challenged as being vague and had not been interpreted by the state courts and when there existed a state statute, also uninterpreted, dealing with the subject matter covered by the regulations?

2. Did the district court err by using a faulty test to find the mail regulations void?

3. Does the federal Constitution compel the State of California to give "full time lay employees" of attorneys and law students the full range of privileges accorded to attorneys and state licensed investigators in their meetings with inmates?

STATUTES INVOLVED

This case involves the application of the First, Fifth and Fourteenth Amendments to the Constitution, California Penal Code section 2600, Rules 1201, 1205(d)

and (f), and 2402(8) of the Defendant Procunier, Director of the California Department of Corrections, and Rule MV-IV-02 of the Director's Mail and Visiting Manual. These constitutional provisions, the statute and the Director's Regulations are reprinted as exhibits to this brief.

STATEMENT

Plaintiffs, on behalf of themselves and all other inmates at California penal institutions under the jurisdiction of the California Department of Corrections, filed an amended complaint in the United States District Court for the Northern District of California on July 6, 1972, challenging the constitutionality of certain regulations promulgated by Director Procunier (App. pp. 1-15). The amended complaint requested the convening of a three-judge court under the provisions of Title 28, United States Code, section 2281. This request was granted by Chief Judge Chambers of the Court of Appeals for the Ninth Circuit. Defendants then moved to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure (App. pp. 16-17). Plaintiffs moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (App. pp. 93-95). The motions were heard jointly and, on February 2, 1973, the court issued an order denying the defendants' motion to dismiss the complaint and partially granting the plaintiffs' motion for summary judgment (354 F.Supp. 1092). This order enjoined enforcement of

the above-mentioned regulations and directed defendants to formulate new regulations in their stead, subject to approval by the court, in accordance with the guidance furnished in the court's opinion.

Following the presentation to the court by defendants of proposed regulations in accordance with the opinion and counterproposals by plaintiffs, the court issued a further order on May 30, 1973, regarding the proposed regulations (App. pp. 159-167). Further proposed regulations were submitted by plaintiffs and were approved by the district court on July 20, 1973.

SUMMARY OF ARGUMENT

The district court erred in failing to abstain from deciding the constitutional issues raised concerning inmates' social mail. These regulations, which were challenged as "vague", have not been construed by the state courts. They are fairly subject to an interpretation which would avoid or modify the federal constitutional questions. Further, there is a state statute, as yet uninterpreted, dealing with this subject. Thus, allowing the state courts to pass on plaintiffs' claim may well avoid or modify the constitutional questions. Federal abstention is particularly appropriate because the issues affect a vital state interest, the administration of its prisons. The entire area is one which the courts have been reluctant to enter due to the needs of prison administrators to have wide discretion in the performance of their duties.

We ask this Court to reject the standard adopted by the district court and instead to hold that federal district courts should not set aside state prison regulations unless they lack support in any rational and constitutionally acceptable prison system.

The district court erred in the manner in which it applied its standards to the social mail regulations. Particularly, where there is a lawful right to read a document, there is a commensurate right to copy and preserve it for a legitimate custodial objective.

The district court also erred in determining that the Constitution compels the states to accord to a broad class of persons other than attorneys or state licensed investigators the full range of privileges accorded attorneys in their meetings with inmates. In reaching this conclusion, the court measured the "extent of the restriction against the need for restriction" to determine "due process reasonability". This test may well be appropriate when state prison administrators are formulating a regulation, but it is clearly improper as a standard of constitutional adjudication.

ARGUMENT

I

THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM DECIDING THE CONSTITUTIONAL ISSUES REGARDING THE VALIDITY OF THE DIRECTOR'S MAIL REGULATIONS.

This aspect of the case deals with the control of prison inmates' social mail. The regulations at issue have not yet been interpreted by a state court. In

addition, there is a state statute, also uninterpreted as to this issue, which in pertinent part provides:

"This section shall be construed so as not to deprive [an inmate] of the following civil rights, in accordance with the laws of this state:

. . . (4) To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office. Pursuant to the provisions of this section, prison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery."

We asked the district court to abstain. The court declined to do so.

Since the application of the doctrine of abstention almost certainly involves some delay and some duplication of effort, this Court has held that the doctrine should be applied only in those "special circumstances" where these negative factors are outweighed by the benefits to be gained from application of the doctrine.¹ Thus, this Court has recognized on numerous occasions that federal court abstention is mandated in

¹The doctrine of abstention is to be distinguished from the requirement of exhaustion of state remedies, *Preiser v. Rodriguez*, U.S., 36 L.Ed.2d 439, 443, 93 S.Ct. 1827, 1830 (1973), and the operation of the Federal Anti-injunction statute *Mitchum v. Foster*, 407 U.S. 225 (1972).

order that needless constitutional decisions be avoided and that possible federal-state frictions be kept to a practical minimum. *Reetz v. Bozanich*, 397 U.S. 82, 86-87 (1970).²

The district court, in declining to abstain, relied on *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971). In that case this Court found that abstention would be improper because the state law at issue was not uncertain or ambiguous. 400 U.S. at 438-439. The only question presented, uncomplicated by an unresolved question of state law, was whether the statute was constitutional on its face. This Court decided that it was unconstitutional.

Similarly, in *Zwickler v. Koota*, 389 U.S. 241 (1967), another of the cases cited by the district court, this Court found federal abstention to be improper. The statute in that case was conceded to be clear and precise. It was also conceded that state court construction could not narrow its scope. *Id.* at 250. In reaching its decision, this Court, citing *United States v. Livingston*, 179 F.Supp. 9, 12-13 (E.D. S.C. 1959), affirmed *sub nom. Livingston v. United States*, 364 U.S. 281 (1960) held that:

“Though never interpreted by a state court, if a state statute is not fairly subject to an inter-

²The availability of a readily accessible and meaningful state remedy is a prerequisite to the application of the doctrine of abstention. *Spector Motor Co., v. McLaughlin*, 323 U.S. 101 (1944); *Chicago v. Fieldcrest Dairies*, 316 U.S. 168 (1942). California provides such a remedy. *In re Jordan*, 7 Cal.3d 930, 103 Cal.Rptr. 849 (1972); *In re Van Geldern*, 5 Cal.3d 832, 97 Cal.Rptr. 698 (1971); *In re Harrell*, 2 Cal.3d 675, 87 Cal.Rptr. 504 (1970).

pretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit.’” *Id.* at 251.

As the “special circumstances” required for application of the doctrine of abstention were not present because the statute was “not fairly subject” to an interpretation which would avoid or modify the federal question, the Court held that the district court erred in refusing to consider the constitutional issues.

Thus, “special circumstances” exist where the state statute or regulation under attack is itself ambiguous and thus fairly subject to a construction by the state courts which may avoid or modify the federal constitutional question, *Fornaris v. Ridge Tool Company*, 400 U.S. 41 (1970); *Harman v. Forssentus*, 380 U.S. 528, 534 (1965). In *Lake Carriers’ Assn. v. MacMullan*, 406 U.S. 498 (1972), the Court spoke of the “paradigm” case for abstention as being one where “the challenged state statute is susceptible of ‘a construction by the state courts that would avoid or modify the [federal] constitutional question.’” *Id.* at 510-511 (citations omitted).

In our case, we have regulations which the district court characterized as vague. If so, it would seem that they should be readily susceptible to state interpretation which would avoid or modify the federal question. The very statement by the district court that the regulations are vague constitutes a compelling

reason for abstention. The district court erred in not abstaining.

There is a separate and distinct reason why federal abstention is appropriate. In *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), the case in which the doctrine of abstention was first articulated, the Court found that abstention was proper because the order of the Texas Railroad Commission, which was under attack as offending constitutional mandate, in fact rested upon the authority of a Texas statute. It was not clear whether the statute authorized the Commission's order. The Court held the Texas courts should have the "last word" on the interpretation of their own state statute [*Id.* at 499-500], pointing out that a decision by the Texas courts that the Commission's order was unauthorized by the statute would have ended the litigation without the necessity to resolve the claimed constitutional issue. Thus, the lower federal court should have abstained.

Similarly, in *Reetz v. Bozanich*, 397 U.S. 82 (1970), this Court held that the federal district court, which had declared certain laws and regulations of the State of Alaska unconstitutional, should have abstained. Since the Constitution of the State of Alaska contained provisions, as yet uninterpreted by the Alaskan courts, which would perhaps have altered or resolved the federal constitutional questions, and since the statute and regulations related to a matter of great state concern, the Court held that the district court should have directed the parties to repair to the

Alaskan courts for a resolution of the state constitutional issues.

This Court noted that:

"The *Pullman* doctrine was based on 'the avoidance of needless friction' between federal pronouncements and state policies. The instant case is the classic case in that tradition, for here the nub of the whole controversy may be the state constitution." *Id.* at 87 (citations omitted).

It is noted that we are not now concerned with the statute or regulations being attacked but with the effect on that statute or regulation of yet another state statute, the application of which might well avoid or modify the federal question. This second statute may or may not be itself ambiguous.

In our case, at all times here pertinent there existed in California, in addition to the regulations under attack, a statute dealing in some detail with the effect of a sentence of imprisonment in a state prison on the civil rights of a prisoner (Cal. Pen. Code §2600). We submit that this statute might well be interpreted by the California State Courts so as to avoid or modify the federal constitutional question.

The existence of the state statute is particularly telling and is best exemplified by the district court's dismissal of count two. In that count, the plaintiffs challenged the Director's Rules regarding inmate-attorney mail on the ground that they were unconstitutional. Before the district court could reach the constitutional question, the California Supreme Court

decided in *In re Jordan*, 7 Cal.3d 930, 103 Cal.Rptr. 849 (1972), that these Director's Rules conflicted with Penal Code section 2600 and California Evidence Code provisions regarding confidential communications between an attorney and his client. The district court then dismissed count two on the ground that the confidential mail constitutional issue had been rendered moot by the *Jordan* decision (354 F.Supp. at 1095). Can we not also say it is not unlikely that interpretation by the state court of the California statute as regards social mail could well moot the social mail issue also?

Our case is, we submit, not only remarkably similar to the *Pullman* and *Reetz* cases, *supra*, it is also the "paradigm" case spoken of in *Lake Carriers*, *supra*. The regulations in question were attacked as being vague (App. p. 4). They have not been construed by the state courts. Definitive construction of them by the state courts may well narrow their sweep so as to avoid or materially alter the plaintiffs' constitutional objections. See *Fornaris v. Ridge Tool Co.*, *supra*. Not only this, the operation of the statute as opposed to the regulation might well avoid or modify the federal constitutional question.

In applying both branches of the federal abstention doctrine, the courts have always considered the nature of the state interest involved. Thus, if a "vital state interest" is at issue, federal district courts should to quick to abstain. *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593, 594 (1968) [water rights in New Mexico]; *Toomer v. Witsell*, 334 U.S. 385, 392

(1948) [collection of state taxes]; *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) [complex state administrative law plan]. This Court recently had occasion to comment upon the states' interest in the administration of their prisons:

"It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of these problems." *Preiser v. Rodriguez*, U.S., 36 L.Ed.2d 439, 451-452 (1973).

It is submitted that the state does indeed have a vital interest in the operation of its prisons.

Yet another factor indicating the propriety of federal abstention is the fact that the entire field of prison administration is one in which the courts have been reluctant to interfere, both because of their own

lack of expertise in the field of rehabilitation and because of the recognized need for prison administrators to be possessed of a fairly wide discretion in the day-to-day discharge of their duties. See *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964). It must be remembered that in California the Director of Corrections promulgates general policy and guidelines in the form of state-wide rules and regulations. Individual institutions are expected to formulate specific rules covering their special needs. Regulations appropriate to high security institutions such as Folsom and San Quentin may well be inappropriate to mountain conservation centers [Procurier Deposition, App. pp. 49, 55]. In addition, institutional advisors are expected to attempt to relate the rules to the particular needs of the individual [Procurier Deposition, App. p. 49]. In short, if the punishment is not to fit the crime but rather the custody fit the individual, the courts should be most reluctant to hedge an administrator's discretion in a thicket of constitutional provision.

"Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances." *Preiser v. Rodriguez*, *supra*, 36 L.Ed. 2d 439, 452 (1973).

In summary, we submit that federal abstention is proper in cases where a state enactment, as yet unin-

terpreted by the state courts, is challenged as being vague and thus interpretation of it by the state courts may avoid the federal constitutional question. Even if the enactment directly challenged is not vague, abstention is proper if resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law contained in another state statute. In this case, the Director's Regulations, as yet uninterpreted by the California courts, are challenged as being vague. Also, there exists a California statute (Penal Code section 2600), as yet uninterpreted by the courts, dealing with the rights of prisoners with regard to mail. These considerations mandate federal abstention, especially since the area of prison administration is of vital state interest and since the courts have, in any event, been reluctant to interfere in this area due to the recognized need for prison administrators to be possessed of fairly wide discretion in the day-to-day performance of their duties. These considerations, we submit, together present the "paradigm" case for federal abstention.

II

THE DISTRICT COURT ERRED IN ITS CHOICE OF A STANDARD FOR ASSESSMENT OF THE CHALLENGED REGULATIONS RELATING TO THE CONTROL OF INMATES' PERSONAL MAIL BUT, REGARDLESS OF THE STANDARD, THE REGULATIONS ARE NOT CONSTITUTIONALLY INFIRM.

A. The court erred in its choice of a standard.

We begin this argument by delineating that which is *not* involved in the instant case. An inmate's right of confidential correspondence with his attorney or with a court is not at issue. Nor is his right to correspond confidentially with holders of public office. These rights are guaranteed by California Penal Code section 2600, as interpreted in *In re Jordan, supra*. Similarly, an inmate's right to send confidential letters to the Governor of the State of California and to the administrative heads of the state or federal agencies or boards responsible for his custody and release are not at issue. See *In re Jordan, supra*, at 932-933, 103 Cal.Rptr. at 850. At issue is the extent to which a federal court may intervene in matters of internal prison management to protect asserted First Amendment rights of inmates relating to their social mail.

It is now held that a prisoner does not shed all his First Amendment rights at the prison gates. *Brown v. Peyton*, 437 F.2d 1228, 1230 (4th Cir. 1971). However, it is equally clear that "... [l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a restriction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948);

see *Lanza v. New York*, 370 U.S. 139, 143 (1962).
Indeed:

"Imprisoned felons and inmates of such institutions . . . cannot enjoy many of the liberties, the rights and the privileges of free men. They cannot go abroad or mount the housetops to speak. They are subjected to rigid physical limitations and to disciplinary controls which find no shred of justification in any other context. Even the disciplinary powers of military authorities are not so absolute." *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964); cited with approval in *Seattle-Tacoma Newspaper Guild, et al. v. Parker, et al.*, _____ F.2d _____ (No. 72-2330) (9th Cir. 1973).

More particularly, it is generally recognized that inspection of inmate social correspondence and restrictions on its extent and character by prison officials are inherent incidents in the conduct of penal institutions. *Lee v. Takash*, 352 F.2d 970, 971 (8th Cir. 1965). To the same effect see *Stroud v. United States*, 251 U.S. 15 (1919); *Wilkerson v. Warden*, 465 F.2d 956 (10th Cir. 1972); *Sostre v. McGinnis*, 442 F.2d 178, 199-201 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, and 405 U.S. 978; *Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970); *McCloskey v. Maryland*, 337 F.2d 72 (4th Cir. 1964); *Adams v. Ellis*, 197 F.2d 483 (5th Cir. 1952); *Leeper v. Birzgalis*, 314 F.Supp. 808 (W.D. Mich. 1969); *Argentine v. McGinnis*, 311 F.Supp. 134 (S.D. N.Y. 1969); *Holland v. Beto*, 309 F.Supp. 784 (S.D. Tex. 1970); *Foster v. Jacob*, 297 F.Supp. 299 (C.D. Cal. 1969).

Two cases have, however, gone so far as to hold that the states have no justifiable interest in reading outgoing prisoner mail. *Guajardo v. McAdams*, 349 F.Supp. 211 (S.D. Tex. 1972);³ *Morales v. Schmidt*, 340 F.Supp. 544 (W.D. Wis. 1972).⁴ The district court herein did not rest its holding on such broad grounds. The district court held that any prison regulation or practice which restricts the right of free expression which the prisoner would have enjoyed had he not been imprisoned must be judged by one of two standards: (1) whether it is related both reasonably and necessarily to some justifiable purpose of imprisonment (see, e.g., *Carothers v. Follette*, 314 F.Supp. 1014, 1024 (S.D. N.Y. 1970)), or (2) whether it advances a "compelling" state interest. (See, e.g., *Fortune Society v. McGinnis*, 319 F.Supp. 901 (S.D. N.Y. 1970).) *Id.* at 1096. The court found that it was unnecessary for it to choose between these possible standards since it concluded that the regulations in question failed whichever be applied.

We submit that the court overlooked the proper test to be applied in such a case. This test is whether the regulation "lacks support in any rational and constitutionally acceptable concept of a prison system." *Seattle-Tacoma Newspaper Guild v. Parker*, *supra*; *Sostre v. McGinnis*, *supra*, at 199-200. Thus, in

³The Court of Appeals for the Fifth Circuit granted a hearing en banc in this case on May 14, 1973 (476 F.2d 1285).

⁴It is noted that this case was reversed by the Court of Appeals for the Seventh Circuit. *Morales v. Schmidt*, _____ F.2d _____ (12 Crim.L.Rptr. 2378, Jan. 17, 1973). This decision in turn is being reconsidered en banc.

Morales v. Schmidt, F.2d, 12 Crim.L.Rptr. 2378 (7th Cir. 1973),⁵ the court held that the proper test is whether "the action contemplated bears a rational relationship to or is reasonably necessary for the advancement of a justifiable purpose of the State", such as rehabilitation of the inmate. Indeed, one circuit court has used the standard of whether the regulations at issue are "unjustified and unreasonable with respect to the needs of prison restraint and discipline". *Wilson v. Prasse*, 463 F.2d 109 (3rd Cir. 1972).

This "rational and constitutionally acceptable" standard is premised on the fact that the administration of the state prisons is primarily a state function and that federal courts should refuse to interfere with this state function in all but the most extreme cases of shocking deprivation of fundamental rights. *Baldwin v. Smith*, 446 F.2d 1043 (1st Cir. 1971). It is also based on the fact that the relation between inmates and the prison administrators is substantially different from the corresponding climate and relationships in the world outside the prison walls. *Preiser v. Rodriguez*, U.S., 36 L.Ed.2d 439, 451-452 (1973); *Seattle-Tacoma Newspaper Guild v. Parker*, *supra*. Indeed, constitutional limitations on governmental actions differ depending on the role in which government is acting. Thus, withdrawal or limitation of certain privileges generally taken for granted by the majority of free men may be justified by consider-

⁵See footnote 4, *supra*.

ations underlying the correctional system, *Price v. Johnston*, *supra*, and an inmate's rights with reference to social correspondence are something fundamentally different than those enjoyed by his free brother.

Prison administrators are entrusted with a broad responsibility toward their charges in that their duty is not only the maintenance of order and good discipline within the prison but also the rehabilitation to the extent possible of the persons entrusted to their care. Because of this relationship they need flexibility and wide discretion in the day-to-day discharge of their duties. See, *e.g.*, *Smith v. Schneckloth*, 414 F.2d 680 (9th Cir. 1969). Therefore, the validity of limitations on these rights must be tested with this distinction in mind also.

Of course, order and good discipline must be maintained within the prisons. Inroads on the basic First Amendment rights also arise from this inescapable fact of prison life. Tensions and the proximity of prisoners to their fellows and to their custodians militate against the application of the First Amendment standards applicable to the general population. See *Knuckles v. Prasse*, 302 F.Supp. 1036, 1056-1057 (E.D. Pa. 1969), *affirmed*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 936, *rehearing denied*, 404 U.S. 877. A prison yard lacks a leavening of substantial citizens. Thus, that which may be within the ambit of protected speech if shouted by a zealot to homeward bound commuters in Grand Central Station at 5:30 p.m. might well, in the tense and charged at-

mosphere of a prison, lead to violence or disruption. Indeed, *Wilson v. Prasse*, 463 F.2d 109 (3d Cir. 1972), holds that the standard by which regulations are to be tested is are they "unjustified and unreasonable with respect to prison restraints and discipline?"

Nor are inmates in California prisons divorced from the outside world. As long as inmates are allowed unlimited confidential communication with attorneys, courts, the administrative agency heads responsible for their treatment and their legislators, they are afforded ample protection against possible excesses by correctional staff, as well as a privileged safety valve. Although certain of the phrases in the Director's Regulations arguably offend the First Amendment principles applicable to a free man in a free environment, we submit that, given the status of a prison inmate, his singular relationship with the prison administrators, the compelling need for the maintenance of order and discipline within the prison, and the volatility of the prison environment, the challenged regulations are well above the test of whether they lack "support in any rational and constitutionally acceptable concept of a prison system."

B. The regulations in question are not constitutionally infirm, regardless of the standard used.

Even reading the challenged regulations in light of the "reasonable and necessary" test,⁶ it does not ap-

⁶We note that the test is stated in other cases as whether the rule "bears a reasonable relationship to or is reasonably necessary" for the advancement of a justifiable state purpose. *Morales v. Schmidt*, *supra*, F.2d (7th Cir. 1973), but see note 4, *supra*.

pear that they constitute unjustifiable or unnecessary restrictions on a prisoner's right of expression. In Rule D-2402(8), prohibition of letters pertaining to criminal activity is clearly proper. The prohibition of "lewd" or "obscene" letters is also proper since these terms are synonymous and obscene matter is not accorded First Amendment protection. *Miller v. California*, U.S., 41 U.S.L.W. 4925, 4927 (1973). The prohibitions against "defamatory" matter, and against matter "otherwise inappropriate" to the purposes of rehabilitative social correspondence are within the discretion of the prison administrators. The ban on the inclusion of "foreign matter" in envelopes supposedly containing only letters also does not violate any right. This is routinely done in the case of air mail letters.

Director's Rule 1205(d), which defines contraband in part as "any writings or voice recordings expressing inflammatory political, racial, religious or other views or beliefs, when not in the immediate possession of the originator, or when the originator's possession is used to subvert prison discipline by display or circulation" is not invalid on its face. Such matter clearly presents a danger to prison security and may properly be controlled or prohibited. We note that in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), the Court upheld a conviction under an Illinois statute banning public display of matter portraying the "depravity [or] criminality . . . of any race . . . or religion" and exposing them to contempt or derision

“or which is productive of breach of the peace or riots”.

Rule 1205(f), which defines as contraband “any writing or voice recordings constituting escape plans or plans for the production or acquisition of explosives or arms, possession of which is forbidden by law to inmates” is plainly neither unreasonable nor unnecessary.

The last paragraph of Rule 1205 deals with matter not defined as contraband and which, therefore, may not be the subject of disciplinary proceedings. Such matter, if it tends to subvert prison order and discipline, may be stored as “inmate’s property” and he may have access to it under supervision [Procunier Deposition, App. p. 57]. This regulation, we submit, places no restriction on an inmate’s First Amendment rights to communicate with the free world. It simply recognizes a category of material which used unwisely in the charged prison atmosphere could present a danger to both order and rehabilitation.

Rule 1201 is directed toward matter which is of legitimate concern to the prison administration. Agitation, magnification of grievances, undue complaining and behavior which might lead to violence are all matters which may be subjected to regulation both as a precaution against flash riots and in the furtherance of inmate rehabilitation.

Finally, the lower court’s order is imprecise in that it fails to distinguish between the various purposes served by the regulations and instead places a whole-

sale prohibition on their enforcement for any purpose. These several purposes of the regulations deserve and must be given varying and individual consideration. The court found that improper correspondence could be (a) rejected for mailing, (b) the subject of a disciplinary report or (c) photocopied and placed in the inmate's file. 354 F.Supp. at 1095-1096. Though recognizing these three differing results, nevertheless the district court ordered that the same test of impropriety be applied in every case. We submit that this is error. We perceive no constitutional barrier to the copying of inmate's social mail lawfully read by correctional officers. See *Hayes v. United States*, 367 F.2d 216 (10th Cir. 1966) (where such material was used in a criminal trial). The purpose of this mail is to assist in the process of rehabilitation.⁷ Since the mail itself may be read, it may be copied. And if it may be copied, placing a copy of it in an inmate's file is not a giant's step. Such mail is a valuable tool in gauging progress toward rehabilitation. Regulations which might not survive constitutional tests if used to reject mail would be valid if used to gauge the progress of rehabilitation. Considerations which might justify rejection of a letter might well not justify the taking of disciplinary action. The court, however, failed to make any of these distinctions.

⁷"Correspondence with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined persons and may form the basis for good adjustment in the institution and the community." Association of State Correctional Administrators—August 23, 1972—*Uniform Standards for Guidance of Institutional Administrators and Personnel*.

For all these reasons, we submit that the district court erred in enjoining enforcement of the defendant Director's Regulations regarding inmate "social" mail and we submit that the district court be mandated to re-examine its rulings in the light of the proper constitutional standard.

III

THE CONSTITUTION DOES NOT COMPEL THE STATES TO ACCORD NON-ATTORNEYS THE RIGHT TO CONFER CONFIDENTIALLY WITH PRISON INMATES.

The district court enjoined enforcement of a prison rule limiting attorney's visiting privileges to no more than two investigators so designated by the inmate's attorney, and who must themselves be either state licensed investigators or members of the bar. Appellants were ordered to replace this rule with one which was "less restrictive" and were advised by the district court that "bona fide law students under the supervision of attorneys, or full time lay employees of attorneys" would constitute a reasonable group of "investigators". 354 F.Supp. at 1099. In an attempt to comply with the court's order, the defendants opened the class of investigators to include law students certified under the California State Bar rules for the practical training of law students (App. pp. 140-141). The court rejected this proposal, holding that "defendants' failure to include paraprofessionals constitutes an unreasonable restriction on inmates' right of access to the courts" (App. p. 165) and order-

ing a regulation defining the term "paraprofessionals" as "persons regularly employed by the attorney of record to do legal and quasi-legal research on a full-time basis" (App. p. 166).

The basis for the court's decision appears to be that the rule in question violates inmates' right of reasonable access to the courts. It is clear that the courts, state or federal, have no general obligation to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief. *Johnson v. Avery*, 393 U.S. 483, 488 (1969). The practice in most federal courts is to appoint counsel in post-conviction proceedings only after a petition for post-conviction relief passes initial judicial evaluation and the court determines that an evidentiary hearing is warranted. *Id.* at 487. Similarly, no general right exists for the appointment of counsel to represent an indigent in a civil case. 28 U.S.C. §1915; *United States ex rel. Gardner v. Madden*, 352 F.2d 792 (9th Cir. 1965). However, it has long been recognized that prisoners, as well as other persons, have a right of reasonable access to the courts. *Ex parte Hull*, 312 U.S. 546, 549 (1941).

The district court relied upon a California case, *In re Harrell*, 2 Cal.3d 675, 87 Cal.Rptr. 504 (1970), which "measured the *extent* of the restriction against the *need* for restriction" in considering the reasonableness of prison regulations and cited three factors:

1. The extent to which access to the courts is impeded or discouraged.

2. How undesirable is the conduct sought to be prevented from the viewpoint of legitimate custodial objectives?

3. Are there reasonable alternative means which do not entail so significant a restriction?

The district court first found on the basis of an affidavit that prison visits are so time consuming to attorneys that they are reluctant to undertake them⁸ and reasoned that the time would be better spent on the not always consistent objectives of:

1. Providing better legal assistance to present inmate clients.

2. Representing additional inmate clients.

Thus, the district court reasoned, access to the courts is substantially impaired. The district court then conceded that there was a threat to prison security but finally found that this interest could be served by the less restrictive means of permitting law students and paraprofessionals to have attorney privileges. The fact that experimental law school sponsored programs arranged on an individual basis between certain institutions and selected law schools permitted some law students to enter prisons with attorney's privileges [Procunier's Deposition, App. p. 68], apparently mandated that all law students must be permitted entry

⁸We may note that though San Quentin Prison and Folsom Prison are distant from the office of the attorney in question, they are near to San Rafael and Sacramento respectively, where attorneys are both active and activist.

and this entry, in turn, demanded that other paraprofessionals⁹ be afforded the same privilege.

Neither this brief nor affidavits on summary judgment are the time and place to settle the paraprofessional debate which still rages in many states. See generally, Brickman, *Expansion of the Lawyering Process Through a New Legal System: The Emergence and State of Legal Paraprofessionalism*, 71 Colum.L.Rev. 1153 (1971); Smith, *Vertical Expansion of the Legal Services Team*, 56 A.B.A.J. 664 (1970). The propriety of the use of law students for inmate legal assistance is perhaps more generally accepted. The appellants most strongly submit, however, that it is bordering on the absurd to find a federal court holding these groups as a matter of constitutional compulsion must be given an attorney's special privileges when visiting a state prison. Even were we to concede that under *Harrell* principles it is better practice to permit this kind of privilege, does it follow that the constitution compels it?

We submit that the district court's opinion creates a new constitutional right in the inmate. This "right" compels the states to subordinate valid prison security requirements to the fashioning of new methods which would assertedly improve preexisting means of access to the courts. If a better, which is defined as less restrictive, means can be found, it must be used. Thus,

⁹Later defined as "persons regularly employed by the attorney of record to do legal and quasi-legal research on a full-time basis" (App. p. 166). We note that these classes are *not* coterminous and that designation by attorneys of "investigators" without more, has caused problems [Procunier Deposition, App. p. 63].

no matter what the method used by the prison authorities to refrain from unnecessary interference with inmates' access to the courts, if a "better" or "more reasonable" method can be found, the existing system is constitutionally prohibited. We submit that this notion transforms a federal judge into a prison administrator and gives an inmate most favored nation status. This cannot be. Rather, we submit, the proper duty of the federal court or indeed of any court is to delineate the basic constitutional right and then ask if this federal minimum has been satisfied. If it has, the federal inquiry ends. See, *Hatfield v. Bailleaux*, 290 F.2d 632, 639-640 (9th Cir. 1961). The constitutional question must be not "can it be improved?" but rather "is it arbitrary?"

Reasonable access to the courts has been defined as the "opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and to sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters." *Hatfield v. Bailleaux*, 290 F.2d 632, 637 (9th Cir. 1961). It has also been defined as encompassing "all the means which a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." *Gilmore v. Lynch*, 319 F.Supp. 105, 110 (N.D. Cal. 1970) (three-judge court), *aff'd sub nom., Younger v. Gilmore*, 404 U.S. 15 (1971).

The rule in question does not deny inmates access to their attorneys. Nor does it impair the confidential relationship between an attorney and his clients. Nor does it attempt to deny attorneys the opportunity to use the services of non-attorneys to aid them in their work. Cases such as *Ex parte Hull*, 312 U.S. 546 (1941), and *Johnson v. Avery*, 393 U.S. 483 (1969), are distinguishable since the state's interests involved therein were minimal and it was clearly shown that enforcement of the prison practice or regulation would effectively bar inmates from presenting their grievances to the courts.

Whatever may be the merits generally of the use of law students and non-student legal assistants or "para-professionals" for the performance of some functions previously performed only by attorneys, surely the federal Constitution does not compel the California state prisons to recognize such persons as attorneys for purposes of allowing them confidential communication with inmates. The classes of attorneys and licensed private investigators, which were recognized by the previous rule, are easily defined and identifiable classes. Both are subject to detailed licensing and regulatory statutes of the State of California. Both have been subject to extensive background checks. Both enjoy a status well worth preserving. Both have much to lose. It is not an arbitrary regulation.

We submit that an inmate's constitutional right of access to the courts does not demand that the legitimate requirements of institutional security be subordinated to the convenience of an attorney, especially

when nothing prohibits that attorney from visiting and conferring with his client. The effect of the state prison regulation on the inmates' right of access to the courts, if any, is only speculative and incidental. The regulation under attack is a good faith effort by a progressive director to facilitate and improve inmate access to the courts above and beyond the limits of constitutional compulsion. It should be upheld.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Dated, August 15, 1973.

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(Exhibits Follow)

Exhibit A

UNITED STATES CONSTITUTION—FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION—FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION— FOURTEENTH AMENDMENT, SECTION ONE

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Exhibit B**CALIFORNIA PENAL CODE**

§2600—Suspension and partial restoration of civil rights; forfeiture of public office or position of trust; continued rights.

A sentence of imprisonment in a state prison for any term suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment. But the Adult Authority may restore to said person during his imprisonment such civil rights as the authority may deem proper, except the right to act as a trustee, or hold public office or exercise the privilege of an elector or give a general power of attorney.

Between the time of the imposition of a sentence of imprisonment in a state prison for any term and the time the said person commences serving such sentence, the judge who imposed such sentence may restore to said person for said period of time such civil rights as the judge may deem proper, except the right to act as a trustee, or hold public office or exercise the privilege of an elector or give a general power of attorney.

This section shall be construed so as not to deprive such person of the following civil rights, in accordance with the laws of this state:

- (1) To inherit real or personal property.
- (2) To correspond, confidentially, with any member of the State Bar, or holder of public office, pro-

vided that the prison authorities may open and inspect such mail to search for contraband.

(3) To own all written material produced by such person during the period of imprisonment.

(4) To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office. Pursuant to the provisions of this section, prison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery. Nothing in this section shall be construed as limiting the right of prison authorities (i) to open and inspect any and all packages received by an inmate and (ii) to establish reasonable restrictions as to the number of newspapers, magazines, and books that the inmate may have in his cell or elsewhere in the prison at one time.

Exhibit C

DIRECTOR'S RULE D-1201

INMATE BEHAVIOR—Always conduct yourself in an orderly manner. Do not fight or take part in horse-play or physical encounters except as part of the regular athletic program. Do not agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence.

DIRECTOR'S RULE D-1205

The following is contraband:

- d. Any writings or voice recordings expressing inflammatory political, racial, religious or other views or beliefs when not in the immediate possession of the originator, or when the originator's possession is used to subvert prison discipline by display or circulation.
- . . .
- f. Any writings or voice recordings constituting escape plans or plans for the production or acquisition of explosives or arms, possession of which is forbidden by law to inmates of institutions under the control of the Department of Corrections. Such material as may be contained in books, magazines, or newspapers which have been previously approved for receipt by inmates is excepted.

Contraband will be confiscated. Possession of contraband is grounds for disciplinary action. A disciplinary committee may turn any contraband over to the Adult Authority, regardless of the outcome of any disciplinary proceedings involving that contraband.

Any writings or voice recordings not defined as contraband under this rule, but which, if circulated among other inmates, would in the judgment of the warden or superintendent tend to subvert prison order or discipline, may be placed in the inmate's property, to which he shall have access under supervision.

DIRECTOR'S RULE 2402(8)

[Inmates] may not send or receive letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate.

**DIRECTOR'S MAIL AND VISITING MANUAL
SECTION MV-IV-02**

Investigators for an attorney-of-record will be confined to not more than two. Such investigators must be licensed by the State or must be members of the State Bar. Designation must be made in writing by the attorney.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1465

RAYMOND K. PROCUNIER, Director, California
Department of Corrections, et al., *Appellants*,

v.

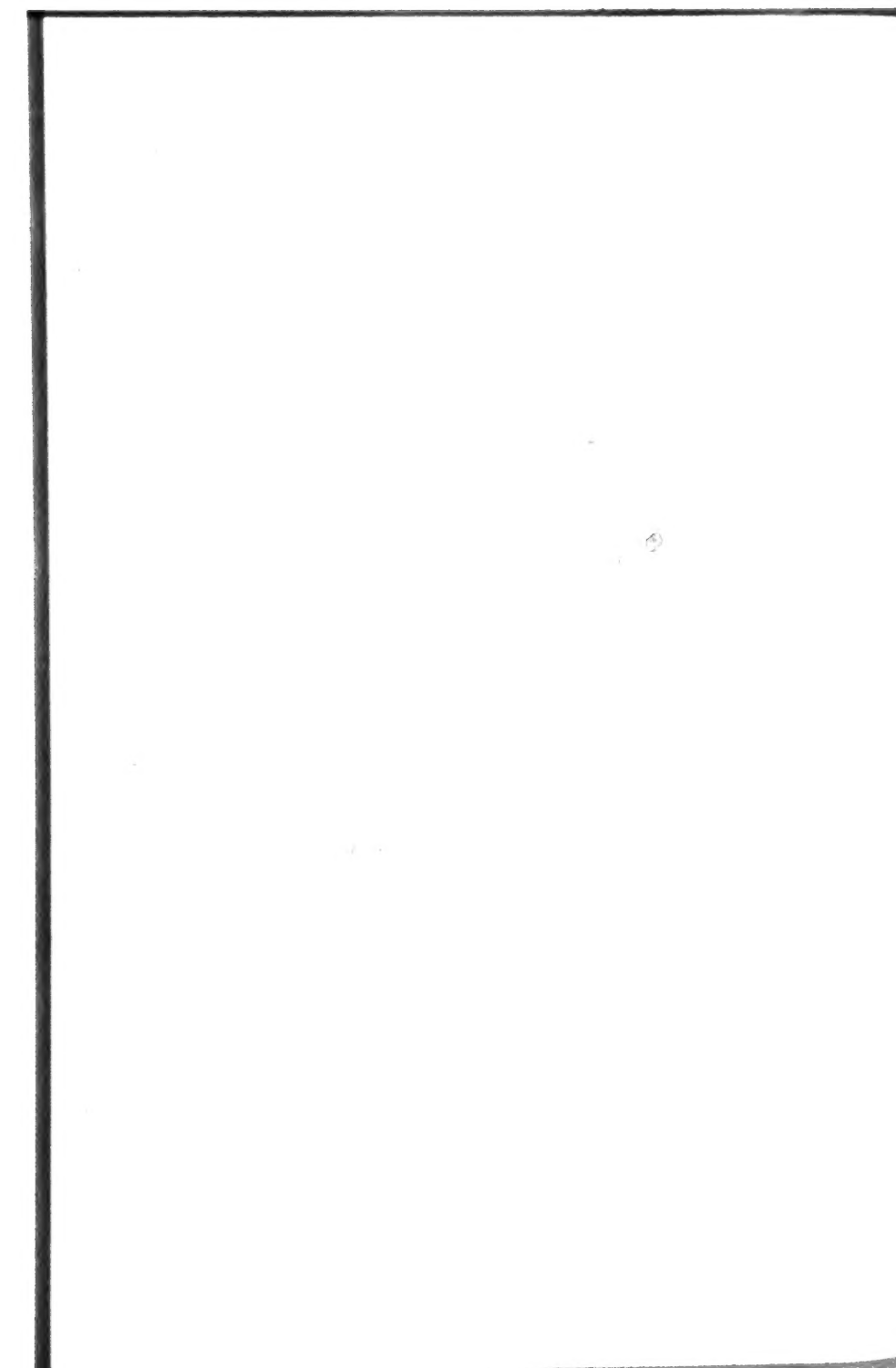
ROBERT MARTINEZ, et al., *Appellees*

On Appeal From the United States District Court For the
Northern District of California

**BRIEF AMICUS CURIAE ON BEHALF OF THE
NATIONAL PARALEGAL INSTITUTE, URGING
AFFIRMANCE**

WILLIAM R. FRY
*Attorney for National Paralegal
Institute, Inc.*





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**BRIEF AMICUS CURIAE ON BEHALF OF THE
NATIONAL PARALEGAL INSTITUTE, URGING
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INTEREST OF AMICUS CURIAE

The National Paralegal Institute was established in June, 1972 under a grant from the Office of Economic Opportunity to support and promote the use of paralegals in the public sector of law, particularly in the area of legal services to the poor. It is a non-profit organization located in Washington, D.C. Because the success of paralegals in serving the poor depends substantially on the development of the entire occupation,

the Institute's broad mandate includes establishing liaison with colleges, law schools, and bar associations, educating members of the legal profession regarding the use of paralegals, and designing training materials for the training of paralegals (See Appendix A). The Institute also serves as a clearinghouse and library for information concerning paralegals in both the private and the public sectors of law.

The National Paralegal Institute has played an important role in the development of the paralegal occupation. The Institute is vitally interested in the further expansion of the use of paralegals. It believes that trained paralegals are capable of providing a significant service to the legal profession and to those in need of legal services, including prison inmates.

The Institute will briefly present information tending to show that paralegals are a well-established and valuable adjunct to the legal profession, and that barring attorneys from using paralegals as part of legal services to prison inmates is an arbitrary and unconstitutional denial of inmates' rights.

ARGUMENT

We are witnessing the creation, development, and rapid growth of a new level within the legal profession—the paralegal (or legal assistant, legal technician, or similar term). A paralegal is, generally speaking, a layman who is trained to assume many of the routine tasks which are now performed by lawyers but which do not utilize the lawyer's unique skills or constitute the practice of law. The duties of paralegals vary according to the setting in which they work. In private law firms, for example, paralegals draft and file corporate documents, maintain clients' tax records, and

collect data relevant to estate planning. In the public sector,¹ among other things, paralegals interview clients, investigate facts, and conduct negotiations. (See Appendix B). Paralegals are being trained to perform a variety of functions in many different areas of the law. It is a purpose of this brief to provide information about the growth of the paralegal occupation and to describe the ways in which paralegals can and should be used to help meet the serious need for more adequate legal services for prisoners.

The development of the paralegal movement has been greatly facilitated by the interest and active support of lawyers and educators.

In 1968, the American Bar Association adopted the following resolution.²

“Recognizing that freeing a lawyer from tedious and routine detail thus conserving his time and energy for truly legal problems will enable him to render his professional services to more people, thereby making legal services more fully available to the public, this Committee recommends:

1. That the legal profession recognize that there are many tasks in serving a client's needs which can be performed by a trained, nonlawyer assistant working under the direction and supervision of a lawyer;

¹ The terms “private sector” and “public sector” appear throughout this brief. “Private sector” refers to private law firms of all sizes. “Public sector” encompasses OEO Legal Services Offices and governmental agencies at the “federal, state and local levels.

² Resolution of the American Bar Association, adopted by the House of Delegates, on the recommendation of the Special Committee on Availability of Legal Services, 93 Reports of the American Bar Association 353 (1968).

2. That the profession encourage the training and employment of such assistants"

The ABA at that time established a Special Committee on Lay Assistants to help implement these recommendations. Since its formation, the Committee has engaged in a variety of activities.

In 1969, the Committee sponsored surveys of law firms around the country and found that there was "a significant" use of non-lawyers.³ In 1970, the Committee held a three week on-the-job training program for legal assistants and lawyers in San Francisco. In 1971, the Committee published a set of recommendations for paralegal training.⁴ In October of 1971, the Committee published a study of new careers in medicine, dentistry, and architecture in order to inform lawyers of parallel paraprofessional developments outside the field of law.⁵ In June of 1971, the Committee co-sponsored a national conference in Denver with the Council on Law Related Studies, and the Association of American Law Schools Committee on Paraprofessional Legal Education. Conferees from many backgrounds throughout the country discussed paralegals in private and public law practice, problems of education, and the future of the occupation. A report on the conference was published entitled *New Careers in Law II*. The Committee

³ Committee on Lay Assistants, American Bar Association, *Lib-
erating the Lawyer: The Utilization of Legal Assistants by Law
Firms in the United States* (preliminary draft, June 1971).

⁴ Committee on Lay Assistants, American Bar Association, *Pro-
posed Curriculum for Training of Law Office Personnel* (prelimi-
nary draft, October, 1971).

⁵ Committee on Lay Assistants, American Bar Association, *The
Paraprofessional in Medicine, Dentistry, and Architecture* (1971).

is currently engaged in a survey of the paralegal training available in colleges.

The Association of American Law Schools has also been supportive of the paralegal movement. In 1970, AALS created a Committee on Paraprofessional Education. Among other things the Committee recommended that AALS:

- 1) Commission two studies: a law review symposium on paralegals (one has since been done at Vanderbilt),⁶ and a study and evaluation of present training programs;
- 2) Consider commissioning a paralegal curriculum development project;
- 3) Consider special admission standards for paralegals in law schools; and
- 4) Consider the emerging need for paralegal teachers.

The American Association of Community and Junior Colleges has been responsive to paralegal training possibilities, primarily through its member colleges which have undertaken two year training courses. AACJC is interested not only in new training programs but also in promoting the community service capacity of its members. The paralegal movement offers the possibility for both. It is the practice of AACJC, in order to promote programs, to prepare national studies of the potential job opportunities in a field, the nature of training, and the structure of training programs. The Association is currently considering producing such materials for paralegals.

⁶ Symposium on Legal Paraprofessionals, 24 Vand. L. Rev. (1971).

A significant element in the development of the paralegal occupation is its training institutions. Through these institutions paralegals are trained to undertake the variety of tasks which different legal situations demand. Some of these training institutions, particularly those training paralegals for private law offices, are well-established and highly sophisticated. Many exist within the framework of law schools, universities and colleges, junior and community colleges and newly created proprietary schools. Other training programs, for both public and private law are informally structured and take the form of in-house or on-the-job training. A closer examination of specific institutions involved in paralegal training programs may give the Court an understanding of the significant role these entities have played in the development of paralegalism.

LAW SCHOOLS

Some law schools, in an effort to promote the paralegal movement, have included in their curriculum training programs for paralegals. The Antioch School of Law offers a training program for paralegals in the public sector of law. In this program trainees learn a variety of legal skills, primarily through clinical experiences.

The University of West Los Angeles School of Law also offers a paralegal program. This program trains paralegals to work in private law firms, and its basic curriculum structure is similar to that of the law school.

In an effort to explore effective methods to train paralegals, particularly for the public sector of law, several law schools have conducted paralegal training pilot study programs. Most of these programs offered intensive studies in specialized public law subjects such

as Fair Housing, Consumer Claims, Landlord-Tenant, Welfare, Domestic Relations, Social Security and Human Rights. Generally, the objective of these programs was to give paralegals an overview of areas of law, train them to identify potential legal problems, and to act as liaison between client and lawyer. The Denver College of Law, Boston College and Columbia Law School are some of the law schools which have engaged in such projects. The results of these studies have provided a theoretical basis for subsequent programs.

UNIVERSITY EXTENSION

Several extension divisions of universities have launched paralegal training programs, primarily for the private sector of law. The two most prominent are at UCLA and USC in Los Angeles. The principal characteristic of these programs is their intensity. Over a four to six week period several hundred hours of training are provided in a specialty such as probate law.

A new paralegal program at George Washington University now trains 44 paralegals in a one year program covering broad general legal knowledge and a series of specialty courses.

COMMUNITY AND JUNIOR COLLEGES

By far, the most extensive institutional training entities among the private schools have been community and junior colleges' two year programs. There are over 25 two year colleges that offer paralegal training programs, and many more are considering adopting such a curriculum; the ABA Special Committee on Legal Assistants has estimated that by the end of 1973

there will be 100 junior colleges offering training for paralegals.

A typical junior or community college curriculum for training paralegals might include the following basic introductory courses:

1. Legal Research and Writing
2. General Law Office Procedures and Management
3. Structure of the Legal System
4. Litigation

and selected areas of specialization:

1. Business Organizations (Corporations, Partnership, Agency)
2. Law of Property, Contracts and Leases, and Real Estate Transactions
3. Income Taxation
4. Wills, Trust and Probate Administration
5. Insurance Law and Claim Investigation
6. Bankruptcy, Domestic Relations
7. Accounting

Concerned groups have suggested that community and junior colleges because of their interest in providing services to the community are an appropriate place to do paralegal training for the public sector of law. Several community and junior colleges have responded enthusiastically to this notion and have expressed an interest in implementing such a program on campuses. Thus, it is anticipated that in coming years, the number

of paralegal training programs in the public sector on two year college campuses will increase substantially.

SINGLE PURPOSE ENTITIES

Several newly created entities provide training programs for paralegals in both the private and public sectors of law. The Institute for Paralegal Training in Philadelphia was established as a private corporation for training select college graduates to be paralegals in private law firms. Trainees attend an intensive three month program during which they specialize in one of the following areas of law:

1. Corporate law
2. Estates and Trusts
3. Litigation
4. Real Estate
5. General Studies—Professional Associations and Benefit Plans

The Dixwell Legal Rights Association, Inc. of New Haven was funded by the Office of Economic Opportunity to improve and extend legal services to the poor. It conducted an experimental paralegal training program for local community workers as well as trainees from anti-poverty Legal Services offices outside of New Haven. (The program is no longer in existence.)

IN-HOUSE TRAINING

Most paralegals in both private and public law are trained on the job or through in-house training sessions. Many private law firms hire capable people with college degrees but little or no legal training and

train them to perform tasks according to the specific needs of that firm.

Other firms provide in-house training for selected staff such as interested and able secretaries. To train such persons attorneys gradually delegate more demanding assignments to these employees under close supervision until they have developed the skills of a paralegal.

Many paralegals in public law are employed in OEO Legal Services offices. In a survey conducted by the National Paralegal Institute during the Fall, 1972 it was established that paralegals are used extensively in these offices. In the 215 responding offices there were 364 full-time and 87 part-time paralegals. Most of these received in-house training (of 127 OEO projects which employ paralegals, 123 had their own in-house training program and in 69 offices this was their sole source of training). The in-house training was usually conducted by OEO staff attorneys and had two components: (1) formal training and orientation, and (2) on-the-job training. Formal training often took the form of two or three day sessions on the function of OEO Legal Services, the nature of the paralegal's job, the rules of ethics, an overview of the courts and legal system, legal skills and techniques, and lectures on the substantive law areas in which the paralegal will be working.

This kind of in-house or on-the-job training of paralegals is also used in many governmental agencies. Although they are not usually identified with the title of paralegal, hundreds of employees in government agencies and branches of government perform the tasks of a paralegal. For instance, paralegals in substantial num-

bers work within the National Labor Relations Board, Equal Employment Opportunity Commission, and Federal Trade Commission. These agencies and the Civil Service Commission are exploring the design of a paralegal job title within federal employment and inter-agency training programs.

There is substantial evidence that paralegals have helped improve the quality and quantity of legal services to the poor. For instance, it has been reported by various anti-poverty legal services offices that their caseload has increased significantly from using paralegals.⁷ This has been accomplished, in part, through a redistribution of manpower workload within the office such that the paralegals conduct virtually all of the initial interviews while the attorneys devote their time to specifically legal matters.⁸

Moreover, the quality of services rendered has been reportedly improved. Legal Services projects with paralegals are handling new kinds of cases and cases that once were given only minimum assistance by

⁷ St. Louis Legal Services reports that over a one year period the annual caseload increased roughly from 9,600 to 13,000. During the period of this caseload increase, the number of attorneys in this St. Louis office decreased but additional paralegals were employed. (This information and that contained in the following four notes was conveyed to the National Paralegal Institute staff in a series of telephone conversations and written communications with Legal Services offices around the country.)

⁸ The Long Beach, California Legal Services Project reports that at the beginning of 1972, paralegals handled 15% of the total caseload of the main office. By the end of 1972, after expanding the paralegal staff while holding steady on the attorney staff, the paralegals were handling over 50% of the cases. The paralegals now do 100% of the initial interviews on every new office case.

attorneys are now being given comprehensive attention.⁹

In surveys and studies by the National Paralegal Institute, Legal Services attorneys have routinely expressed satisfaction with the work product of paralegals who have taken over tasks previously done by attorneys, including drafting correspondence and legal documents.¹⁰ The value of paralegals in Legal Services offices was assessed in the questionnaire administered by the National Paralegal Institute. Of the 215

⁹ This is apparent in a St. Louis office, where attorneys previously received a high volume of insurance cases (*e.g.* automobile insurer refuses to honor a claim), public utility cases, and landlord harassment. Because of the burdens of a heavy caseload attorneys could normally do no more than write a single letter and hope the matter would be taken care of. Frequently this was not enough but attorneys had no time to pursue the matter further. Now that the St. Louis office has paralegals, however, such cases are given extensive attention with an exceptionally high success rate.

¹⁰ A Brooklyn Legal Services attorney who supervises two paralegal specialists in landlord tenant cases finds evidence that the paralegals are doing quality work in that the court papers (*e.g.*, orders to show cause why an eviction should not be ordered) drafted by the paralegals (and signed by the attorney) have been "getting through the courts". A St. Louis attorney has been watching the complaint letters received from clients or from opposing counsel or opposing party-litigants in approximately 1,000 cases handled by four paralegals over a one year period. No complaints have been received that are attributable to the work product or work style of the paralegals. This same attorney reports exceptional satisfaction with the quality of the paralegals' judgment and their overall dependability. Many lawyers have reported that paralegals have become a necessary part of the legal services delivery system. The director of the New Bedford, Massachusetts program reports the impact paralegals have had on his office: "[We have] had a paralegal unit half a year and it is the most indispensable part of our program". In a similar vein, the following comment was made by the New York City Legal Services attorneys: "Our office could not function without him [paralegal]".

Legal Services projects which responded, the verdict was overwhelmingly favorable:

	Number	Percentage
Of great value	143	66.5
Of some value	29	13.5
Of slight or negligible value	none	0
Of no value	none	0

When asked about future utilization of paralegals 127 of these 215 offices said that they had need for additional paralegals. Indeed, some projects are choosing to hire paralegals rather than attorneys when funds for new staff are available.¹¹

Despite the vital role paralegals are assuming in legal services delivery, the California Department of Corrections regulations challenged in the instant case¹² will result in prison inmates being effectively denied access to a valid adjunct to the legal profession. The consequences of this restriction become even more egregious in view of the serious deficiency which exists in the legal services available to prisoners.

As of 1970, there were 211,151 adult male felons confined—21,040 in federal prisons and 190,111 in state prisons. It has been estimated that in one year these prisoners will have 204,900 legal problems or approxi-

¹¹ The Denver Legal Services Program reported that their budget was cut \$102,000 for 1973-74. The staffing decision as a result was to reduce the lawyer staff and not the paralegals. In the Long Beach, California project funds were available in September, 1973 to employ one new attorney or two paralegals. The project opted for the latter.

¹² Director's Mail and Visiting Manual Section MV-IV-02 (Exhibit C, Appellants' Brief).

mately one problem per prisoner per year.¹³ This estimate includes not only questions relating to the prisoner's conviction and incarceration but also civil problems and institutional grievances. It is also estimated that 75-80% of the legal problems raised by prisoners involve more than just legal advice and would not be immediately dismissed as frivolous by an attorney.¹⁴

Yet, prisoners are often severely handicapped in obtaining redress of their legal problems by their financial and educational deficiencies. At least 90% of all prisoners are indigent¹⁵ and so unable to hire an attorney to expedite their cases. Most prisoners are poorly educated and many are illiterate. The President's Crime Commission in 1967 found that 82% of all prisoners had not even finished the eighth grade.

The result of this combination of factors is that many prisoners have no alternative but to file appeals and petitions on their own. Because in many cases the prisoner has so little education the petitions are often poorly pleaded and virtually incoherent. The burden on the courts created by these petitions is immense.

Judges are well aware of the needs of prisoners for legal assistance. As Judge Leventhal stated in *United States v. Simpson*, 436 F.2d 162 (D.C. Cir. 1970):

" . . . In the last analysis, however, the problem of petitions for collateral review that are frivolous,

¹³ Jacob and Sharma, *Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 505, 509 (1970). (hereinafter Jacob and Sharma article).

¹⁴ Commission on Correctional Facilities and Services, American Bar Association, *Providing Legal Services to Prisoners*, 11 (1973).

¹⁵ Jacob and Sharma article, *supra* note 13, at 510.

incoherent, false because copied slavishly from winning patterns, or otherwise lacking merit, seems likely to plague the courts until a system is established for providing legal counsel to federal prison inmates on a reasonably broad basis". (at 167)

Similarly, Judge Curtin emphasized in *United States ex. rel. Stevenson v. Mancusi*, 325 F. Supp. 1028 (E.D. N.Y. 1971):

"... the most important part of a legal assistance plan is not the law books or library, or the availability of decisions, but the opportunity to consult with an attorney, or at least a person of good common sense and experience who can, in a straight forward and complete manner, set forth the inmate's claim in understandable fashion". (at 1032)

There is evidence that increased availability of legal services actually reduces the number of *pro se* petitions filed.¹⁶ It has been the general experience that inmates who are advised that their claims lack merit do not continue to file *pro se* suits but, rather, abide by the advice of their counselor as long as the counselor has credibility in the inmate system.¹⁷ And, those petitions which are filed with the help of a knowledgeable coun-

¹⁶ This was the experience of the University of Kansas Law School which utilized law students. The statistics are reported in Progress Report, Consortium of States to Furnish Legal Counsel to Prisoners, Grant number 71-DF-1116 as Submitted to L.E.A.A. on February 24, 1973.

¹⁷ Note, *Legal Services for Prison Inmates*, 1967 Wisc. L. Rev. 514 (1967); Larsen, *A Prisoner Looks at Writ-Writing* 54 Calif. L. Rev. 343 (1968); Bluth, *Legal Services for Inmates: Co-opting the Jailhouse Lawyer*, 1 Capital U. L. Rev. 59 (1972); Wexler, *Counseling Convicts: The Lawyer's Role in Uncovering Legitimate Claims*, 11 Ariz. L. Rev. 629 (1969).

selor are much more likely to be well-pleaded and to state the prisoner's complaint clearly.

Increasing the access of prisoners to legal services does not benefit only the courts. A study of institutional administrators, conducted by the Center for Criminal Justice of Boston University School of Law, established that the vast majority of administrators believe that legal services would help prison discipline and prisoner rehabilitation.¹⁸

<u>PROPOSITION</u>	<u>AGREE</u>
Prisoner legal services are not now adequate.	76 %
Legal services would not tend to increase prisoner hostility against the institution.	85 %
Legal services would provide a safety valve for grievances (real or imagined) against the institution.	80.4%
Legal services would reduce inmate tensions created by unresolved legal problems.	92 %
Legal services would not tend to have an adverse effect on prison discipline and security.	82.9%
Legal services would help to reduce the effect of prisoner power structures.	80 %
Legal services might help rehabilitation by providing a positive experience with laws and the legal system.	82.4%

Prison administrators were particularly sensitive to the secondary benefits that could derive from providing effective legal services for prisoners. As one prison superintendent noted: "In my opinion, the major con-

¹⁸ Center for Criminal Justice, Boston University School of Law, *Perspectives on Prison Legal Services: Needs, Impact, and the Potential for Law School Involvement* (1972).

tribution would be convincing the offender that he has not been victimized by society and the judicial system". Another attested to the efficacy of legal services by commenting that the program in his institution "has proven to be very effective in relieving tensions through problem solving, be it real or superficial".

Officials specifically charged with rehabilitation — the institutional treatment directors—were even more positive. An overwhelming 97.2% agreed that "an inmate's eventual rehabilitation and successful reintegration into society are significantly affected by unresolved legal problems and that such unresolved legal problems are an impediment to effective participation in treatment programs". They concluded as well that:

<u>PROPOSITION</u>	<u>AGREE</u>
Negative prisoner attitudes toward law and the legal process are a detriment to rehabilitation.	94.4%
These negative attitudes might be improved by a legal service program.	94.4%
A breakdown of external relationships and heavy dependence on institutional value and social systems are harmful to rehabilitation.	95.4%

Efforts are being made to make legal services more readily available to prisoners. Sixty-three law schools across the country offer some form of legal assistance to prisoners.¹⁹ Several states have established separate programs staffed by attorneys to handle prisoners' legal needs.²⁰ Clearly, the further development of such

¹⁹ Council on Legal Education for Professional Responsibility, Inc., *Survey of Clinical Legal Education* (1973).

²⁰ These include Texas, Massachusetts, Ohio, Minnesota, Wisconsin, and Washington.

programs represents a desirable solution to the problem. Yet, programs staffed only by lawyers are costly. Manageable workloads require a large number of attorneys. In addition, the need for face-to-face communication with prisoners cannot be overemphasized. Because of their low educational level, many prisoners are not capable of expressing themselves clearly in a letter, on a form, or in a post-conviction petition. A personal interview is essential to gather facts adequately and to measure the client's credibility and needs. In order for the prisoner to gain respect for our legal system, it is essential that his case be explained to him, especially when no action will be taken. Interviewing and fact gathering, which are undeniably necessary elements of effective legal representation, are time-consuming and often burdensome to attorneys.

It is here, in this crucial area of personal communication with the prisoner, that the potential for paralegal involvement is most promising. It is the common practice in anti-poverty Legal Services offices for a trained paralegal to conduct the initial interview with the client. The paralegal gathers the facts necessary for the supervising attorney's decision whether or not to accept the case and if the case is accepted, what course to pursue. Trained paralegals can be effectively utilized to perform this same function in prisons. Indeed, the National Advisory Commission on Criminal Justice Standards and Goals has recommended that both law students and paralegals be used to provide assistance to attorneys concerned with prisoners' problems.²¹ And the American Bar Association Com-

²¹ National Advisory Commission on Criminal Justice Standards and Goals, *Correctional Standard 2.2* (1973). (publication pending)

mission on Correctional Facilities and Services has estimated that an attorney working with one full-time paralegal and two law students could handle twice as many prisoners' cases as an attorney working alone.²²

The potential benefits of using paralegals to conduct fact investigation by interviewing prisoners can be obtained without impairment of the security of the institution. Paralegals performing this function will be under the direct supervision of an attorney.

An attorney can be required to provide, in advance of the prison visits, the names of the paralegals working for him. Other information such as that requested of regular visitors can also be obtained by the institution to insure that the paralegal's background is acceptable and to verify that he or she does not pose a threat to prison security. Such procedures are already in practice for visits by the families and friends of inmates and so would not unduly burden the prison administrators.²³

CONCLUSION

The paralegal occupation has developed to the point where it is widely recognized as a distinct level within the legal hierarchy. Many programs exist for the training of paralegals in educational institutions. Paralegals are being used to perform a variety of tasks in private law firms, government agencies, and Legal Services offices. To forbid paralegals from entering prisons to interview inmates is to deny prisoners an aspect of legal assistance which is available to those

²² ABA Report, *supra* note 14 at 25.

²³ See *e.g.* Folsom State Prison Mail and Visiting Regulations (1973); California Institution for Men Visiting Policy (1973).

who are not imprisoned. Further, it is to ignore a significant resource which could be used to ease the problem of providing more adequate legal services to prisoners.

The National Paralegal Institute urges the Court to find that the regulation barring paralegals in the employ of attorneys from admission to California prisons in connection with legitimate legal services being offered by the attorney is a violation of the Constitutional rights of inmates.

Respectfully submitted,

WILLIAM R. FRY
*Attorney for National Paralegal
Institute, Inc.*

APPENDIX

APPENDIX

APPENDIX A*Publications of the National Paralegal Institute*

Training materials for paralegals now (or soon to be) available include:

- The Role of the Paralegal
- Interviewing—A Trainer's Manual
- Legal Interviewing for Paralegals
- Investigation in a Law Office: A Manual for Paralegals
- Unauthorized Practice and Ethics Rules
- Introduction to the Legal System—A Short Story for Paralegals
- Legal Research
- Legal Writing
- Dictionary of Paralegal Functions
- Teaching Advocacy: Learner-Focused Training for Paralegals
- Contracts, Torts, and Due Process

Specialized materials available or in preparation include:

- Background of the Paralegal Movement
- Model Training Curriculum
- The Santa Cruz Story—Senior Citizens' Legal Services—a movie and accompanying manual
- Welfare Basic Structure
- Welfare System (ATD, AFDC)
- Welfare Case Interviewing
- 16 mm film—How to Establish a Paralegal Unit
- 16 mm film—Interviewing
- 16 mm film—The Administrative Hearing
- Video Tape—Interviewing

APPENDIX B

Excerpts from "What Have Paralegals Done?: A Dictionary of Functions", a 1973 publication of the National Paralegal Institute, offered to show in detail the work which paralegals are now doing in selected areas of legal practice.

Frequency, Skill, Supervision

At the far left hand corner of each of the following pages are three columns which will provide the reader with some information on each task listed. The three columns will be:

FIRST COLUMN: "Fr." (Frequency)

On a scale of three, this column will provide a *rough estimation* of how commonly the task is being performed by paralegals in the country today. The scale will be "1" "2" or "3" (or a fraction thereof):

"1": infrequently performed

"2": being performed a fair number of times

"3": being performed frequently

SECOND COLUMN: "Sk." (Skill)

On a scale of three, this column will provide a *rough estimation* of how much skill (*e.g.*, organizational ability, reading comprehension, perseverance, etc.) the paralegal needs to perform this task. The scale will be "1" "2" or "3" (or a fraction thereof):

"1": does not require much skill to perform

"2": requires a moderate amount of skill to perform

"3": requires considerable skill to perform

THIRD COLUMN: "Su." (Supervision)

On a scale of three, this column will provide a *rough estimation* of how much lawyer supervision has been needed to assist the paralegal to perform the task listed. The scale will be "1" "2" or "3" (or a fraction thereof):

"1" requires very little supervision of paralegal to perform the task

"2" requires a moderate amount of supervision of paralegal to perform the task

"3" requires a considerable amount of supervision of the paralegal to perform the task

EXAMPLE:

ITEM	Fr.	Sk.	Su.
A. Making a preliminary draft of a will ..	1	3	3
B. Serving papers in court on a divorce case	3	1	1

INTERPRETATION :

Paralegals seldom draft wills (1); they often serve papers (3). It takes considerable skill to draft a will (3); it takes very little skill to serve papers (1). A great deal of supervision is needed to assist a paralegal to make a preliminary draft of a will (3); it takes very little supervision on serving papers (1).

No effort is made in the following pages to evaluate the effectiveness of performance on any listed task. The only test of whether an item is included in the following pages has been: does any evidence exist that the paralegal is performing the task listed? Also, no effort is made to describe the training program (formal or on-the-job) that the paralegals went through to be able to perform the task.

Corporate Law

	Fr.	Sk.	Su.
<i>I. Incorporation and Corporate Work</i>			
<i>A. Pre-Incorporation</i>			
1. Check on availability of proposed corporate name and if available reserve it	3	1	1
2. Draft pre-incorporation subscriptions and consent forms for initial board of directors where required by statute	2	2	2

Fr. Sk. Su.

B. Incorporation

1. Draft and file articles of Incorporation with appropriate state agency	2	3	2
a. Sub-chapter S Corporation	2	3	2
b. Close corporation	2	3	2
c. Non-profit organization ...	1	3	2
2. Draft minutes of initial meetings of incorporators and directors	3	2	1
3. Draft corporate by-laws	2	3	2
4. Obtain corporate seal, minute book and stock certificate book	3	1	1
5. Prepare necessary documents for opening of corporate bank account	3	1	1

C. Director's Meetings

1. Prepare and send out waivers and notices of meetings	3	1	1
2. Draft minutes of directors meetings	3	2	1
3. Draft resolutions to be considered by directors:			
a. sale of stock	2	3	3
b. increase in capitalization..	2	3	3
c. stock splits	2	3	3
d. stock option	2	3	3
e. pension plan	2	3	3
f. dividend distribution	3	3	2
g. election of officers	2	3	2

	Fr.	Sk.	Su.
D. Shareholder's Meetings (Annual and Special)			
1. Draft sections of annual report relating to business activity, officers and directors of company	2	3	3
2. Draft notice of meeting, proxy materials and ballots	3	1	1
3. Prepare agenda and script of meeting	2	3	2
4. Draft oath and report of judge of elections when required ...	2	2	1
E. Drafting, Generally			
1. See drafting above in reference to director's and shareholder's meetings			
2. Shareholder agreement	2	3	3
3. Stock option plan	2	3	3
4. Trust agreement	1	3	3
5. Tax returns	3	3	3
6. Closing papers on corporate acquisition	2	3	3
7. Employment agreement	1	3	3
II. Public Sale of Securities			
A. Compile information concerning officers and directors for use in Registration Statement	2	2	2
B. Assist in research of Blue Sky requirements	2	3	2
C. Closing			
1. Prepare agenda	3	2	2

6a

	Fr.	Sk.	Su.
2. Obtain certificates from state agencies with respect to good standing of company and certified corporate documents ..	3	2	2
3. Prepare indices and organize closing binders	3	2	2
<i>III. Miscellaneous Corporate Activities</i>			
A. Prepare documents for qualification to do business in foreign jurisdictions	2	3	2
B. Prepare necessary documents to amend articles of incorporation or by-laws	3	3	3
<i>IV. Research</i>			
A. Legislative reporting: keep track of pending legislation that may affect office clients	1	3	3
B. Summarize/digest certain files (a file profile)	2	3	3
C. Extract designated information from corporate records and documents	2	3	3
D. Assemble financial data from records on file at SEC and state securities regulatory agencies	1	3	3
<i>V. General Assistantship</i>			
A. Maintain "tickler" system (e.g., specifying next corporate meeting, upcoming trial, appellate court dates)	2	3	2
B. Monitor the daily law journal (e.g., specifying certain cases on calendars of courts, current court decisions, articles, etc., and forwarding such to appropriate office attorneys)	3	3	2

7a

	Fr.	Sk.	Su.
C. Act as file managers of certain clients (index, monitor documents in the file, etc.)	3	2	2
D. Maintain corporate forms file ..	3	2	1

*Criminal Law**I. Pre-Trial**A. Investigation*

1. Verify information	3	2	1
2. Find evidence and additional information	3	3	2
3. Locate witnesses	2	2	1
4. Search official records	3	2	2
5. Write investigation reports for attorneys	3	3	2

B. Explain the criminal process (to defendants, to witnesses, to complainant—if work for DA—to relatives)

1. the bail process	1	2	2
2. the preliminary hearing	1	2	2
3. the trial and appeal process..	1	3	2

C. Assist in Bail Process

1. Verify bail information	3	1	1
2. Help find bail bondsman	2	1	1

D. Develop case for alternative to incarceration in anticipation of conviction

1. Identify community resources (Job training, drug rehabilitation, counselling, medical help, etc.)	2	2	1
--	---	---	---

	Fr.	Sk.	Su.
2. Determine whether these resources would be willing to enroll the accused now or upon a court order	2	2	1
3. Get a letter from agencies to this effect or see if a representative of the agency will appear in court on behalf of accused	2	2	1
E. Draft preliminary pleadings, legal research .....	.5	3	2
<i>III. Trial</i>			
A. Argue entire case for client in court .....	.5	3	1
B. Argue part of case for client in court .....	.5	3	1
C. Be General Assistant to Lawyer at Trial			
1. Keep files together	2	2	2
2. Be available for assignments (e.g., get a document during the recess)	2	2	2
3. Take notes for the attorney..	1	2	2
4. Make suggestions to attorney on what to ask witnesses	1	3	3
D. Be a witness for the defense (e.g., if paralegal came across information during investigation that needed his verification, etc.)	1	2	3
<i>IV. Appeal</i>			
A. Legal research .....	.5	3	3
B. Statistical research (e.g., look over jury lists to determine whether any patterns of de facto or de jure discrimination might exist)	1	3	3
C. Monitor the files on court appeals	3	1	1

Fr. Sk. Su.

V. Miscellaneous

Write pamphlets on criminal law for distribution in the community	1	3	3
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*Investigation Generally**I. Document Gathering*

A. Medical records	3	2	1
B. Police records	3	2	2
C. Birth and death records	3	2	1
D. Marriage records	3	2	1
E. Adoption and custody records..	3	2	1
F. Incorporation records	3	2	2

II. Record Research

A. Find out from court dockets if a particular merchant being sued has sued before (does any pat- tern exist?)	2	3	2
B. Find out who the "real owner" is of an apartment building	2	3	2
C. Check housing code agency to see if a particular landlord has other building code violations against him on record	3	2	1

III. Statistical Research

A. Spot check merchants to deter- mine if pricing discrimination or false advertising exists	1	2	2
B. Interview families along a pro- posed highway route to deter- mine what problems they are facing and/or to provide them with information on the con- demnation process	1	2	2

	Fr.	Sk.	Su.
IV. Fact Gathering (other than documents)			
In a wide range of cases (<i>e.g.</i> , criminal, divorce, custody, housing, <i>etc.</i>), the investigator substantiates facts, follows leads for possible evidence in connection with litigation, <i>etc.</i>	3	3	2
V. Filing/Service			
A. Serve parties involved in litigation	3	1.5	1
B. File papers in court	3	1	1
VI. Act as Court Witness			
A. As to service of process	1	1	1
B. As to data uncovered or photographed (<i>e.g.</i> , the condition of an apartment building)	1	3	3
Litigation, Generally			
I. File Monitor on Cases in Litigation			
1. Index all files	3	3	2
2. Write case profile based on information in the files	2	3	2
3. Read attorney briefs to check accuracy of the information in the litigation file	2	3	3
4. Organize and index documents obtained through discovery	2	3	2
II. Investigation			
1. Interview witnesses	3	3	2
2. Trace documents and other physical evidence	3	2	2
3. Examine public records (<i>e.g.</i> , to determine how many times a particular corporation has been sued)	2	3	2

	Fr.	Sk.	Su.
<i>III. Interrogatories/Depositions</i>			
1. Make preliminary draft of interrogatories	2	3	3
2. Make preliminary draft of answers to interrogatories	2	3	3
3. Digest and index interrogatories and depositions	3	3	3
4. Make preliminary draft of deposition questions	2	3	3
<i>IV. Filings/Serving: in court, at agencies, on parties, on attorneys, etc. . .</i>			
	3	1	1
<i>V. General Assistantship</i>			
1. Arrange for clients and others to be interviewed	3	2	1
2. Arrange for expert witnesses to appear in court or at depositions	3	2	1
3. Reconstruct from a large collection of disparate records and other evidence what happened at a particular time and place	2	3	3
4. Digest deposition transcripts ...	2	3	2
5. Assist clients in completing information questionnaire (<i>e.g.</i> , in reference to class action plaintiffs)	1	2	2
6. Prepare charts/tables to be used as exhibits at trial	2	3	2
7. Sit at counsel's table at trial in order to take notes and suggest questions to attorney to be asked of witnesses	1	3	2
<i>VI. Legal Research</i>			
1. Shepardizing, cite checking	2	3	2
2. Memo and brief writing .....	.5	3	3
3. Prepare bibliographies of source materials related to litigation ...	3	2	2

	Fr.	Sk.	Su.
VII. Pleadings: Preliminary draft of pleadings using office standard forms and referring to pleadings written by attorneys on similar cases	2	3	3
VIII. Expert Analysis: Render expert opinions to attorneys:			
1. taxation	2	3	3
2. accounting	2	3	3
3. statistics	2	3	3
4. economics (<i>e.g.</i> , calculation of damages)	2	3	3

Post-Conviction Remedies and Corrections Law

I. Problem Identification

A. Inmate wants to appeal conviction directly	3	3	1
B. Inmate wants to attack conviction collaterally (<i>via coram nobis</i> , <i>habeas corpus</i> , <i>etc.</i>)	3	3	1
C. Inmate wants to challenge a decision of the parole board	3	3	1
D. Inmate wants to challenge a decision of the prison staff, <i>e.g.</i> , denial of the right to subscribe to a particular journal	3	3	1
E. Inmate wants to have help in preparing his parole board case	1	3	1
F. Inmate wants help in preparing his case before the disciplinary committee	2	3	1
G. Inmate wants help in preparing his administrative appeal of the decision of the disciplinary committee	1	3	1

	Fr.	Sk.	Su.
H. Inmate feels that staff has improperly calculated the time he must serve because of:			
a. a failure to give the inmate credit for time served while waiting trial	2	3	1
b. a failure to give the inmate credit for "good time" earned	2	3	1
c. a misreading of the court's sentence	2	3	1
II. Writ-Writing, Administrative Complaint Writing			
A. Inmate helps other inmate draft writ by studying other cases and by doing research in the prison law library and in the inmate's own personal law "library"	3	3	1
a. to obtain appointment of counsel	3	3	1
b. to obtain an evidentiary hearing	3	3	1
c. to obtain a free copy of court records, <i>e.g.</i> , trial minutes (<i>via in forma pauperis</i> petition)	3	3	1
d. to obtain "good time" credit that the inmate-client claims is his due	3	3	1
B. Inmate helps other inmate draft a written complaint			
a. addressed to parole board complaining about a parole decision	2	3	1
b. addressed to prison staff complaining about a prison decision <i>e.g.</i> , to discontinue library hours, to transfer an inmate's job assignment	2	3	1

	Fr.	Sk.	Su.
III. Record Gathering: assist the inmate in obtaining court papers in the hands of attorneys, DA's, court clerks, etc. (e.g., copy of the judgment, indictment, trial minutes, depositions, correspondence, etc.)	3	2	1
IV. Representation			
A. One inmate "represents" another at a disciplinary hearing ..	.5	3	..
B. One inmate "represents" another at a parole board hearing (a staff member may also "represent" the inmate at both kinds of hearings)	.5	3	..
V. Librarian: Act as clerk-librarian for the prison law library, (keep the texts up to date with new additions, etc.)	3	1	1
VI. Mediation: Act as go-between in disputes involving staff and inmate:			
A. Inmate as mediator	1	3	1
B. Staff member as mediator	3	3	1

APPENDIX C**Institutions Offering Paralegal Training Programs****CALIFORNIA**

California State U. at Los Angeles
5151 State University Drive
Los Angeles, California
Joseph E. Deering

Canada College
4200 Farm Hill Blvd.
Redwood, California 94061
415-364-1212

City College of San Francisco
51 Phelan Avenue
San Francisco, California
James McConnel

Dominican College of San Rafael
San Rafael, California 94901
Henry Aigner, Dean

Fullerton Junior College
321 East Chapman Avenue
Fullerton, California 92634
714-871-8000

Glendale University
College of Paralegal Studies
220 North Glendale Avenue
Glendale, California 91206

LaVerne College
Graduate Studies School
LaVerne, California
714-593-3511

Lone Mountain College
2800 Turk Blvd.
San Francisco, California 94118

Los Angeles City College
855 N. Vermont Avenue
Los Angeles, California 90029

Merritt College
12500 Campus Drive
Oakland, California 94619
415-531-4911

Mid-Valley College of Law
Div. of Assoc. Legal Arts
Suite A-2
15910 Ventura Blvd.
Encino, California
213-9867-175

Peralta Junior College District
Oakland, California

Sawyer College of Business
6832 Van Nuys Blvd.
Van Nuys, California
213-873-1919

UCLA
University Extension
Los Angeles, California
UCLA Daytime Programs
10995 LeConte
Room 437 G
Los Angeles, California 90024
213-825-2301

University of Southern California
Program for Legal Paraprofessionals
Law Center and Univ. Coll. Ext. Div.
Admin. Bldg. Rm. 354
Los Angeles, California 90007

University of West Los Angeles
School of Law-Div. of Paralegal Studies
11000 West Washington Blvd.
Culver City, California 90230
213-873-1203

COLORADO

Community College of Denver
Auraria Campus
1201 Acoma Street
Denver, Colorado 80204

DISTRICT OF COLUMBIA

Antioch School of Law
1145 19th Street, N. W.
Washington, D. C. 20036
202-833-9614

George Washington University
Legal Assistant Training Program
2029 K Street, N. W.
202-676-7036

ILLINOIS

Harper College
Paralegal Program
Palatine, Illinois 60067

MARYLAND

Washington Business School
Paralegal Course
5454 Wisconsin Avenue
Chevy Chase, Maryland 20015

MICHIGAN

Macomb Community College
Warren, Michigan

MINNESOTA

North Hennepin State Junior College
7411 85th Avenue North
Minneapolis, Minnesota 55455

University of Minnesota
General College
106 Nicholson Hall
Minneapolis, Minnesota
612-373-4816

MISSOURI

Meremac Community College
Kirkwood, Missouri 63122

NEVADA

Reno Junior College of Business
Wells and Wonder
Reno, Nevada 89502
Don S. Thompson

NEW JERSEY

Burlington County College
Pemberton, New Jersey 08360
DeWitt Peterson

Cumberland College
Box 517
Vineline, New Jersey
609-691-8600

NEW YORK

College for Human Services
201 Varick Street
New York, New York 10014

OHIO

Capital University
2199 E. Main Street
Columbus, Ohio 43209
John W. McCormac

OREGON

Clackamas Community College
Oregon City, Oregon
Chairman, Business Division

Lane Community College
4000 E. 30th Avenue
Eugene, Oregon 97405

Mt. Hood Community College
26000 S.E. Stark Street
Gresham, Oregon
Jack D. Miller

Portland Community College
12000 S.W. 49th Avenue
Portland, Oregon 97219

PENNSYLVANIA

Allegheny Community College
808 Ridge Avenue
Pittsburgh, Pa.
412-321-0192

Institute for Paralegal Training
401 Walnut Street
Philadelphia, Pa.
215-925-0905

SOUTH CAROLINA

Greenville Technical Education Center
P.O. Box 5616 Station B
Greenville, South Carolina 29606
Fred H. Piott

UTAH

University of Utah
College of Law
Salt Lake City, Utah
801-581-6987

LIBRARY
SUPREME COURT, U. S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1465

RAYMOND K. PROCUNIER, DIRECTOR,
CALIFORNIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Appellants,

v.

ROBERT MARTINEZ and
WAYNE EARLEY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

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(ii)

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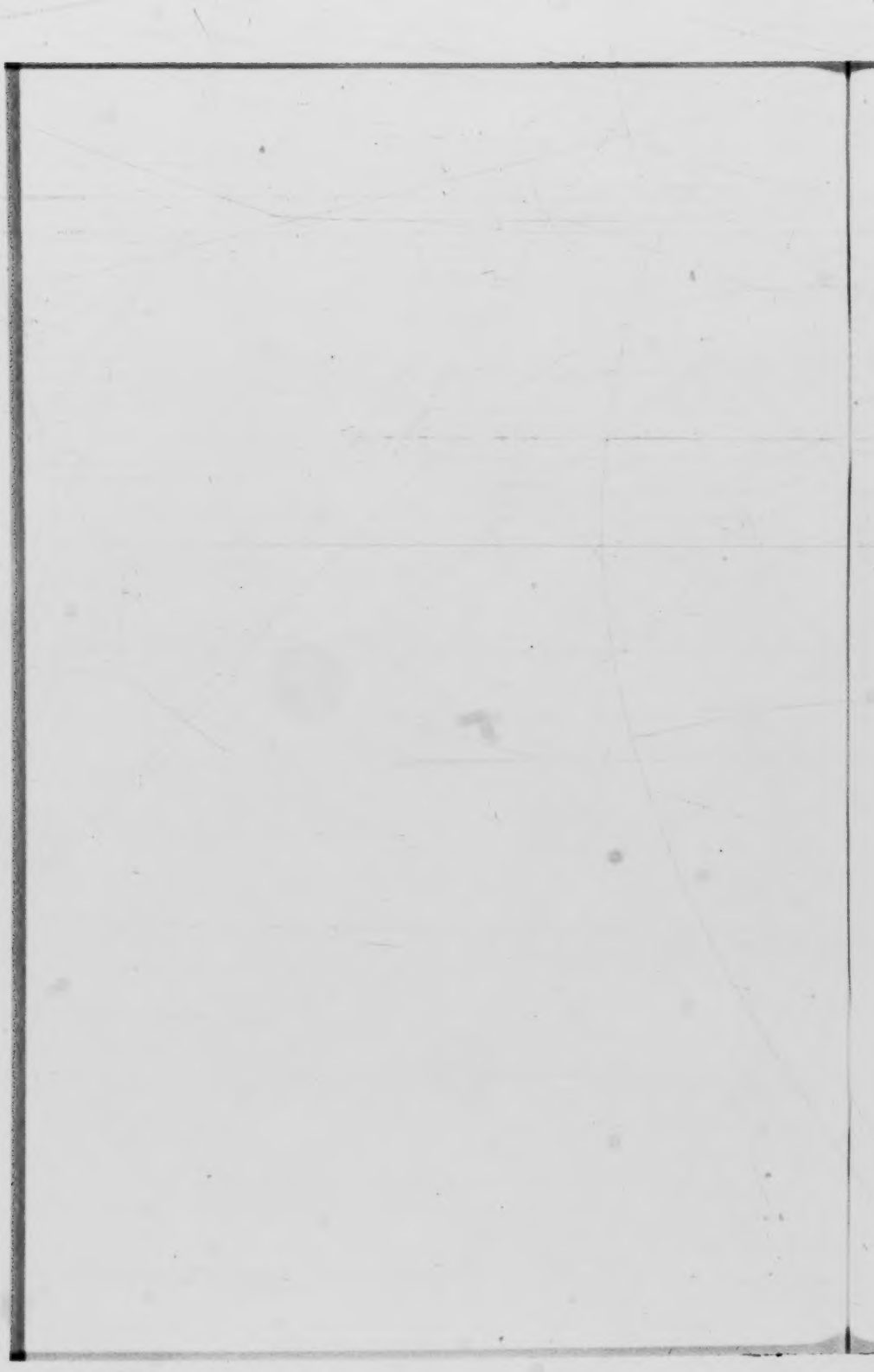
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1465

RAYMOND K. PROCUNIER, DIRECTOR,
CALIFORNIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Appellants,

v.

ROBERT MARTINEZ and
WAYNE EARLEY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Whether the district court should have abstained from deciding one of the two federal constitutional questions presented and required appellees to institute proceedings in state court, and whether abstention should be ordered in the present posture of the case.

2. Whether the district court properly invalidated the mail censorship regulations involved in this case, and

whether the new regulations approved by the court's final order fully protect every legitimate interest of appellants.

3. Whether the district court properly invalidated appellants' absolute prohibition against use by attorneys of law student or paraprofessional investigators to interview prisoners on their behalf, and whether the new regulation approved by the court's final order, authorizing the use of investigators certified by the State Bar, fully protects every legitimate interest of appellants.

STATEMENT OF THE CASE

A. Further Proceedings in the Court Below

Following the decision from which this appeal was taken, the district court received proposed regulations from appellants and further evidence presented by appellees (A. 98-134). On July 20, 1973, the court gave final approval to the revised regulations submitted by appellants. Such regulations are set forth in the Supplement to Appendix at pp. 194-203. We submit that the final regulations, approved over appellees' objections (Supp. A. pp. 204-210), fully protect every legitimate interest of appellants.

B. Statement of Facts

Conspicuously missing from appellants' Statement is any mention of the factual record and evidence on which the decision of the district court was soundly premised. Accordingly, we here state the pertinent facts.

1. *Mail censorship*

The California mail censorship rules are expressly based on the premise that mail is a "privilege", not a

"right", which may be granted or withheld in the discretion of prison officials (A. 48, 64).

Prisoners confined in California institutions who desire to communicate by mail are required to submit letters to prison officials who censor them to determine whether they conform to certain rules (A. 19,28—Admission 1). The rules involved here are the following:

Director's Rule 2402(8) prohibits prisoners from writing letters that are, *inter alia*, "defamatory . . . or are otherwise inappropriate" (A. 19,28; Exhibit C to Appellants' Brief);

Director's Rule 1201 forbids prisoners from writing letters in which, *inter alia*, they "unduly complain" or "magnify grievances" (*Id.*); and

Director's Rule 1205(d) defines "contraband" to include "any writings . . . expressing inflammatory political, racial, religious, or other views or beliefs when not in the immediate possession of the originator . . ." Letters may constitute contraband writings within this rule (A. 19, 28—Admission 1).

Outgoing letters submitted for mailing by prisoners and incoming letters addressed to prisoners may be read by mailroom staff and by other employees of the prison (A. 19,29—Admission 2; A. 48-50). No criteria or standards, other than those contained in the rules set forth above, are furnished to the mailroom staff to guide them in deciding whether a particular letter violates any prison rule or policy (A. 19-20—Admission 2).

Letters found objectionable by the mailroom staff may be rejected for a variety of reasons. For example, at Folsom Prison the checklist used by staff to reject letters authorizes rejection for, *inter alia*, "criticizing policy, rules or officials" and "mentioning inmates by name or number or relating gossip or incidents"; and staff may also reject letters for reasons they deem appropriate

(A. 78-79, 50-51, 72-73). The checklist used at San Quentin also authorizes rejection of letters for a number of reasons, including "not proper correspondence" and "prison gossip" (A. 67, 51). The checklist used at the institution at Vacaville specifies a number of other reasons for rejecting correspondence, including "offensive language" (A. 52; exhibit 4 to Procunier dep.; Supp. A. 190). Appellant Procunier testified that rejecting letters for these reasons is permissible under the Director's Rules set forth above (A. 50-52).

Given the absence of standards for guiding mailroom staff, and the broad and vague reasons deemed permissible for rejecting letters, it is not surprising that prison officers frequently reject letters that criticize them or express opinions they disagree with. Thus, the mailroom sergeant at Folsom Prison will reject letters as "defamatory" (within the meaning of Director's Rule 2402(8)), if they are

"belittling staff or our judicial system or anything connected with the Department of Corrections" (A. 75).

Letters will be prohibited for "magnifying grievances" (within the meaning of Director's Rule 1201), if they are "belittling the staff because of their incompetency" (A. 75). Another official has rejected numerous letters on the ground that they contain "disrespectful comments," or "misrepresenting of facts," or "derogatory remarks," or material that is "discriminatory or derogatory toward any individuals or races," or "referring to the different employees at the institution and making allegations and stating mistruths and so forth," or "erroneous information," or what the official thinks is "misinformation" about the prison or "prison gossip" (A. 91, 92, 81-86, and

exhibits 1-8 to Morphis dep.).¹ The same criteria govern censorship of both outgoing and incoming letters (A. 86).

When a prison employee² decides that a letter constitutes improper correspondence, he is authorized to take the following actions, alone or in combination:

- (a) refuse to mail the letter and return it to the prisoner;
- (b) submit a disciplinary report which may lead to suspension of the prisoner's mail privileges as specifically authorized by Director's Rule D2401 or to more severe disciplinary punishment up to and including confinement in segregation;³
- (c) photocopy the letter and place it or a summary of its contents in the prisoner's permanent file (A. 20,29—Admission 5; A. 59-61).⁴

¹ The letters rejected are in evidence and are innocuous by any standard. They are mostly letters to mothers, fathers or other relatives complaining of treatment the prisoners have allegedly received. The official rejected a letter as stating "misinformation" even though he knew that the statements he objected to were direct quotations from a published newspaper article, explaining the prisoner's reasons for withholding his consent to an "aversion therapy" program (A. 85 and exhibits 4 and 5 to Morphis dep.).

² Censorship is done by guards assigned to mailroom duty, their civilian helpers, members of the night watch or the officer in charge of a lock-up unit (A. 29, 59, 73-74, 81).

³ See A. 77; Supp. A. 170; A. 24, 45—Admission 24; Supp. A. 172; A. 24-25, 43—Admission 28. The severity of disciplinary punishments in California prisons is comprehensively described in *Clutchette v. Procunier*, 328 F.Supp. 767 (N.D. Cal. 1971).

⁴ Placed in plaintiff Martinez's file, for unexplained reasons, were copies of letters to a relative and to a federal judge (A. 59-60; exhibits 5 and 6 to Procunier dep.).

Letters may be placed in a prisoner's file even if they do not violate any rule, if mailroom staff believe that the letters "reveal an inappropriate attitude toward prison staff or society or express radical political views" (A. 21,29-Admission 7). Letters placed in a prisoner's file are referred to and consulted by prison classification committees which determine the prisoner's housing and work assignments (A. 21,29-Admission 8). Such letters are also available to the California Adult Authority which decides whether and when to grant parole (A. 21, 29-Admission 9; A. 60).⁵

There is no effective procedure by which a prisoner may challenge a guard's censorship decision. Although appellants say that the prisoner can "appeal" (A. 20, 29-Admission 6), there is no Director's Rule establishing any such procedure; prisoners are not informed of the possibility of appeal; there is no hearing of any kind and there is no provision for review by anyone other than the censor.⁶ Regarding incoming letters rejected by staff, there is not even a provision for notice to the prisoner that the letter had been received at the prison and rejected.

Despite the obvious deficiencies and invitations for abuse contained in their rules, appellants offered no evidence whatever, not even their opinion, to show that

⁵ Indeed, Director's Rule 1205(f) specifically authorizes the retention of "contraband" writings, which may include letters, for referral to the Adult Authority (A. 21, 30-Admission 10; Supp. A. 172; A. 24-25, 43-Admission 28).

⁶ Three different officials described three completely different and inconsistent procedures to use in seeking review of a mail decision (A. 58-59, 76, 87), but one candidly admitted that there is "no established policy" (Miranda dep. p. 24). Appellants keep no records regarding rejected letters (A. 34-35).

there is a legitimate need for such rules, that danger to prison security might result without them or that the rules were reasonable or necessary to promote the orderly functioning of the prisons. The court below expressly found that the rules were not "reasonable and necessary", were "without any apparent justification" or any "conceivable justification on the grounds of prison security" and "would not appear necessary to further any of these functions [of prisons in America]." 354 F.Supp. at 1096 (emphasis by the court).

In response to the decision of the district court, appellants developed and submitted new censorship rules. The rules proposed by appellants and given final approval by the district court (Supp. A. 211-212) continue to regulate the content of prisoner mail, but with considerably more specificity. The approved rules also include a simple procedure for administrative appeals of lower-level censorship decisions (Supp. A. 197-198). Appellants have suggested no reasons, either here or in the district court, why the court-approved regulations do not protect every legitimate state interest.

2. *Law student and paraprofessional investigators for attorneys*

The Mail and Visiting Manual Section MV-IV-02, promulgated by appellant Procunier, authorizes personal interviews of prisoners by their attorneys of record or the designated representative of the attorney of record (A. 22,30—Admission 17). However, the designated representative of an attorney must be either a member of the California Bar or an investigator licensed by the State of California (*Id.*). Interviews by law students or paraprofessional assistants to attorneys are prohibited (*Id.*).

This rule bars interviews regardless of the qualifications or identity of the student or assistant, the attorney

or the prisoner to be interviewed, and regardless of the type of case, the need to use an investigator or any other possibly relevant factor. Thus, in this very case, counsel for appellees, who was requested by the district court to investigate and to consider undertaking an uncompensated appointment in this case, requested permission to have a supervised law student interview plaintiff Martinez for the purpose of investigating and preparing the case (Supp. A. 184-186, 177-182). Permission was denied by prison officials solely on the ground that no such interviews are permitted under their rule (*Id.*).

Appellants' rule prohibiting interviews by law students and other supervised paraprofessionals works a substantial inconvenience to attorneys representing prisoners or considering whether to represent prisoners (Supp. A. 184-188). Because of the remoteness of most California institutions, personal visits by attorneys are necessarily rare and very inconvenient (*Id.*). Indeed, such visits are so time-consuming and inconvenient that, as the court below found, attorneys are generally reluctant to make such visits, and this may mean that they decide not to provide any representation. 354 F.Supp. at 1098. This is especially true where the prisoners are indigent, as most are, and cannot pay for the attorney's expenses or time in making personal visits. Of course, indigent prisoners are financially unable not only to retain paid counsel but also to hire licensed investigators, the only paraprofessionals appellants permit to interview prisoners. There is a growing number of highly qualified and academically trained legal paraprofessionals who are completely barred by appellants' rule from acting as investigators for lawyers representing prisoners (A. 127-130).

Although appellants prohibit law students assisting attorneys from interviewing prisoners, they permit a large number of law students in their institutions on a regular basis. There are law student programs at most if not all California prisons (A. 61, 113-115, 116). Law students,

with only the minimal supervision of a faculty member, are permitted to interview prisoners and assist them on legal matters (*Id.*; Supp. A. 188; A. 35-39). The prison officials make no inquiry into the qualifications of law students in these programs, and make no security check on them (*Id.*; A. 62).

In response to the decision of the court below, appellants developed and submitted a new investigator rule. Under the new rule proposed by appellants and approved by the court below, law students and legal paraprofessionals certified by the State Bar of California may serve as investigators for attorneys (Supp. A. 198-200). Appellants' Brief, filed well after the final order of the district court, inexplicably asserts that the class of authorized investigators is much broader (pp. 24-27). This is just untrue. Indeed, since at present there is *no* procedure for State Bar certification of paraprofessionals,⁷ the only addition to the former rule consists of State Bar certified law students. Even these students are subject to far more stringent precautions than those applicable to non-certified law student programs already authorized by appellants (compare Supp. A. 198-200 with A. 113-114). Appellants have not suggested, either here or in the district court, any reason why allowing lawyers to utilize the services of State Bar certified law students would interfere with any legitimate state interest.

⁷As pointed out in n. 35, *infra*, the State Bar has strongly recommended legislation authorizing certification, to utilize the services that can be provided by qualified paralegal personnel. But since there is no such procedure presently in effect, appellants' new rule will not immediately result in any use of paraprofessional investigators. Under the State Bar's existing Rules Governing the Practical Training of Law Students, certified students are permitted to perform a wide range of functions in the investigation, preparation and presentation of legal matters under the supervision of attorneys. See State Bar of California *Reports* (Feb. 1970).

SUMMARY OF ARGUMENT

I.

The district court did not err in declining to abstain from deciding one of the two federal constitutional questions presented—the constitutionality of the mail censorship regulations. Neither of the arguments that appellants now urge for abstention was presented to the court below. In these circumstances, appellants cannot now claim that the district court abused its equitable discretion by proceeding to decide the constitutional question presented.

Moreover, abstention is not required simply because the regulations were invalidated, in part, on the ground of vagueness. This Court has repeatedly held that abstention is not proper in such circumstances. Here, there is no unsettled issue of state law whose resolution could eliminate the federal question. Nor have appellants suggested any construction of the regulations that could conceivably cure their vagueness. And, in any event, the challenge here is not limited to vagueness. Further, there is no state statute that is fairly subject to a construction that would avoid or modify the constitutional question.

Finally, there is no clearly available and adequate state remedy in California that could have justified the federal court's abstaining and thus forcing appellees to repair to the state courts. California habeas corpus is the only state prisoner remedy, and it would not be effective to protect the rights involved here. Requiring appellees to institute state proceedings would only have caused delay, expense and frustration, and the federal constitutional question would not have been eliminated.

Even if abstention might have been appropriate as an initial matter in the district court—assuming the proper

grounds had been timely raised by appellants—abstention should not be ordered in the present posture of the case. Everything the abstention doctrine is designed to postpone—premature federal proceedings involving state officials—has already occurred here without specific objection by appellants. And since appellants have not contended that the new regulations submitted by them and given final approval by the court below fail to protect any of their legitimate interests, it would make no sense to order the district court to abstain now.

II.

The district court properly invalidated appellants' former mail censorship regulations. There is no contention in this case that prison officials may not inspect and read prisoner mail. The issue concerning the constitutionality of regulations under which guards censor and punish prisoners for the content of their letters—the words they use—was properly resolved by the court below. The only provisions invalidated prohibited prisoners from writing letters in which they "unduly complain," or "magnify grievances" or express certain "views or beliefs" or which are deemed "defamatory" or "otherwise inappropriate." These provisions are not needed to serve any legitimate penal interest. Recognizing that prisoners' First Amendment rights may be curtailed because of their restrictive environment, and keeping in mind legitimate penal interests, the rules here are nevertheless invalid because (1) they are overbroad in that they prohibit lawful and protected expression; (2) they are unduly vague, with the result that standardless and discriminatory enforcement is encouraged; (3) they fail to give fair notice of conduct that may be severely punished; and (4) they lack procedural safeguards against

suppression of protected speech through error or arbitrariness. A principal use of the rules has been to suppress criticism of prison guards and their policies, regardless of whether such criticism is valid.

The record is barren of any justification for the rules in question, and the district court properly found, on the evidence presented, that no legitimate penal consideration supported them. Furthermore, responsible correctional authorities throughout the nation now reject mail censorship of the kind involved here as unsound correctional practice. The authorities find such censorship unnecessary and counterproductive. The only real controversy among the authorities today is whether prisoner mail should be read at all, not what contents should be censored or punished, and that is not an issue that the Court must now resolve.

Finally, showing more than ample deference to appellants, the district court gave final approval to new regulations developed and submitted by appellants. These regulations fully protect every legitimate state interest.

III.

The district court properly invalidated appellants' former absolute prohibition against use by attorneys of law student or paralegal investigators to interview prisoners. Appellants voluntarily began permitting State Bar certified law students to perform this function. The only requirement added by the district court was to include State Bar certified paralegal assistants; but since there is presently no such paralegal certification, appellants have not yet been required to do anything they are not already doing voluntarily.

The decisions of this Court have firmly established the principle that prisoners have a due process right of

effective access to the courts for the purpose of setting aside invalid convictions or remedying invasions of their constitutional rights while incarcerated. But appellants' former rule barred all law student and paralegal assistants to attorneys regardless of their qualifications and regardless of the need to use them in order to provide legal assistance to indigent prisoners. This results in denial of effective access to the courts for such prisoners. The California Bar and the American Bar Association have strongly recommended the use of law students and paralegals to assist in providing legal services to those otherwise unable to obtain them. If use of such persons is merely desirable as a general matter, it is absolutely essential if indigent prison inmates are to receive vital assistance in obtaining access to the judicial process.

Appellants here were unable to show any countervailing state interest to justify their rule impeding indigent prisoners' due process right of effective access to the judicial process. Yet the burden of justifying the exclusion of trained and supervised assistants to lawyers should be greater than the burden of justifying restrictions on "jailhouse lawyers," which this Court struck down in *Johnson v. Avery*, 393 U.S. 483 (1969). Here, the district court gave more than adequate deference to any legitimate interest of appellants. The new regulation developed and submitted by appellants, which was given final approval by the court below, fully protects every legitimate state interest.

ARGUMENT

**I. THE DISTRICT COURT DID NOT ERR IN DECLIN-
ING TO ABSTAIN FROM DECIDING ONE OF THE
TWO FEDERAL CONSTITUTIONAL QUESTIONS
PRESENTED, AND ABSTENTION SHOULD NOT BE
ORDERED NOW.**

Appellants contend that the district court should have abstained from deciding one of the two federal constitutional questions—the constitutionality of the mail censorship regulations (Appellants' Brief, p. 5). Appellants do not suggest that the court should have abstained from deciding the other half of the case, dealing with denial of access to investigators for attorneys. Appellants argue that the court should have required appellees to repair to the state courts to institute proceedings on the first issue because (1) the mail regulations were challenged, in part, on the ground of vagueness, and (2) a construction of California Penal Code §2600(4) might have avoided or modified the federal constitutional question. Neither of these contentions was presented to the court below. We submit that the court below was not required initially to abstain and that, in any event, abstention should not be ordered now.

**A. The District Court Was Not Required
Initially To Abstain.**

As noted above, neither of the specific arguments now urged for abstention was made in the district court. Appellants' failure to raise these points below ought to bar them from belatedly claiming that the court should have abstained. Cf. *Brown v. Chote*, 411 U.S. 452 (1973); *Tacon v. Arizona*, 410 U.S. 351 (1973); *Jones v. United States*, 357 U.S. 493, 499-500 (1958), indicating that

such tactics are not favored by this Court. Since abstention "involves a discretionary exercise of a [federal] court's equity powers," *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964), and since appellants did not ask the court below to exercise its discretion on the grounds now urged,⁸ they cannot now claim that the court abused its equitable discretion by proceeding to decide the federal constitutional question presented.

Even if appellants did not waive their abstention arguments by failing to present them seasonably below, the new arguments are without merit and inconsistent with recent precedents in this Court.

1. *Abstention is not required simply because regulations are challenged and invalidated, in part, on the ground of vagueness.*

Appellants leap from the fact that the mail regulations were found to be defective because they are, *inter alia*, unconstitutionally vague, to the conclusion that the district court was required to abstain until the regulations had been authoritatively construed by a state court. This simplistic assertion directly conflicts with this Court's decisions in *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Keyishian v. Board of Regents*, 385 U.S. 589, 601, n.9 (1967); *Dombrowski v. Pfister*, 380 U.S. 479, 489-490 (1965); and *Zwickler v. Koota*, 389 U.S. 241, 252

⁸In the district court appellants did make one very short and half-hearted statement that the court should abstain. But the statement was no more than a generality in the course of argument on the merits that plaintiffs had not stated a claim. (See defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss, p. 10 (dated Sept. 8, 1972).) Neither of the specific grounds for abstention urged here was ever presented to the court.

(1967). In all these cases the Court held that abstention was inappropriate even though the state provisions were challenged and struck down as impermissibly vague or overbroad. As Mr. Justice White carefully explained in *Baggett v. Bullitt*, *supra*, a case involving provisions held "unduly vague, uncertain and broad" (377 U.S. at 366), the "abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law . . ." *Id.* at 375. Abstention may be appropriate when "the unsettled issue of state law principally concern[s] the applicability of the challenged statute to a certain person or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation" (*Id.* at 376-377) (emphasis added). But when the uncertain issue is not a "choice between one or several meanings of a state statute" but among an "indefinite" number of interpretations, and the question is not coverage of "certain definable activities" but rather the complaint is that those affected "cannot understand" the provisions, "cannot define the range of activities in which they might engage in the future, and do not want to forswear doing all that is literally or arguably within the purview of the vague terms", abstention should not be ordered. *Id.* at 377-78. Here, as in *Baggett*, "in light of the vagueness challenge," it is highly unlikely that any State interpretation would avoid or significantly alter the constitutional issue and, with the delay inherent in repairing to the state courts for perhaps repeated interpretations of the vague regulations, abstention would be "a result quite costly where the vagueness . . . may inhibit the exercise of First Amendment freedoms." *Id.* at 379.

In the case at bar there is no unsettled issue concerning the applicability of the regulations to appellees or to their communications by mail, "whose resolu-

tion in a particular manner would eliminate the constitutional issue . . ." Here, as in *Baggett*, the choice is among an "indefinite" number of interpretations and the challenge is that the persons affected "cannot understand" what is prohibited by the regulations and "cannot define the range" of expression which may be "literally or arguably within the purview of the vague terms." Thus, for example, the prisoners cannot know what will be prohibited as "unduly complaining" or "magnifying grievances," or "otherwise inappropriate."

Appellants have suggested no possible construction of the regulations that would cure their vagueness. Indeed, appellant Procunier's testimony (A. 50-52), approving completely open-ended interpretations of the rules, actually compounds their vagueness. Since he is the State official charged with both promulgating and enforcing the rules and "entrusted with the definitive interpretation of the language of the Rule," there is no reason not to accept his construction of the meaning. See *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 161 (1971). As the Court said in *Broadrick v. Oklahoma*, ___ U.S. ___, 41 U.S.L.W. 5111, 5116 (1973), "Surely a court cannot be expected to ignore these authoritative pronouncements in determining the breadth" of the rules. There is no doubt that the district court in this case correctly interpreted the rules and their intent as conferring completely unchecked censorship power.

Furthermore, the challenge here is not limited to vagueness. The court below also held that the regulations were overbroad because they actually outlawed protected speech (e.g., criticism of correctional policies), and that they lacked essential procedural safeguards against denial of valid expression through error or arbitrariness. 354 F.Supp. at 1097. Appellants have suggested no construction of the regulations that could conceivably have eliminated these defects.

2. *Penal Code §2600(4) is not fairly subject to a construction that would avoid or modify the constitutional question.*

Appellants' contention that some construction of California Penal Code §2600(4) by a state court might have avoided or modified the federal constitutional question is frivolous. Appellants have not suggested any such construction. The statute cannot conceivably be interpreted to govern the issues in this case, and no one, least of all the California Attorney General, has ever before had the temerity to say that it might provide a remedy for prisoners in a case like this one. By its own terms, §2600(4) deals only with the receipt by prisoners of "newspapers, periodicals, and books", and a provision authorizes officials to exclude "publications or writings and mail containing information concerning where, how, or from whom *such matter* may be obtained..." (emphasis added). In short, the only mail covered by the statute concerns solicitations for obscene publications or writings; no provision purports to regulate general correspondence.⁹

⁹In contrast, subsection (2) of §2600 expressly provides for confidential attorney mail. While this issue was raised as a constitutional matter in the prisoners' complaint, we recognized that the statute could be construed to govern this issue and accordingly advised the district court that it should abstain until the California Supreme Court decided a case then pending before it (Memorandum filed July 6, 1972, p. 14). In fact, the California court did decide that this provision of §2600 means what it says. See *In re Jordan*, 7 Cal.3d 930, 500 P.2d 873 (1972).

As to general correspondence, the only remotely relevant California state court decision assumes that prison officials have unrestricted censorship powers. See *Yarish v. Nelson*, 27 Cal. App.3d 893, 898, 104 Cal. Rptr. 205 (1972).

That § 2600(4) was never intended to deal with general mail censorship is made clear by recent legislative history. In 1972, a bill was introduced specifically to amend § 2600 to grant limited freedom from mail censorship (Senate Bill 1419). The bill passed the Legislature but was vetoed by Governor Reagan. The bill would have added an entirely new subsection to § 2600, granting prisoners a right to correspond essentially without limitation and subject to inspection only to search for contraband or to prevent commission of a crime.¹⁰

Until now, no one has ever suggested that § 2600(4) had anything whatever to do with general mail censorship, and it is absurd to assert that the statute could dispose of the issues in this case. It is well settled that because of the duplication of effort and expense and attendant delay, abstention is appropriate only in narrowly limited special circumstances where a state statute might reasonably be construed to avoid or modify the federal constitutional question. See *Lindsey v. Normet*, 405 U.S. 56, 62, n.5 (1972); *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 510-11 (1972). Such a construction must be a reasonably possible one, not a strained and fanciful one. "[I]f a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it." *Zwickler v. Koota*, 389 U.S. 241, 251 (1967), quoting from *United States v. Livingston*, 179 F.Supp. 9, 12-13, aff'd, 364 U.S. 281; see also *Harman v. Forssenius*, 380 U.S. 528, 534-535 (1965); compare *Reetz v. Bozanich*, 397 U.S. 82, 86-87 (1970) (case could

¹⁰ The bill was attached as an Appendix to our Motion to Affirm or Dismiss previously filed in this Court.

clearly be decided on applicable and specific state constitutional provisions).

It makes no difference that this case involves a state correctional agency as opposed to some other state agency. The courts have uniformly found no basis for abstaining solely because the defendants were state prison officials.¹¹ Appellants' reliance on *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827 (1973), is misplaced. That case had nothing to do with abstention. The Court in *Rodriguez* was faced with reconciling two federal statutes, the federal habeas statute, which required exhaustion of state remedies, and 42 U.S.C. §1983, which did not. The Court held that if a prisoner is challenging "the very fact or duration of confinement" and is seeking "immediate or more speedy release," habeas corpus is the exclusive remedy. The Court distinguished prior prisoner cases that did not require resort to state courts, *Wilwording v. Swenson*, 404 U.S. 249 (1972), *Haines v. Kerner*, 404 U.S. 519 (1972), *Houghton v. Shafer*, 392 U.S. 639

¹¹ See, e.g., *Shelton v. Union County Board of Commissioners*, ___ F.2d ___, No. 71-151 (7th Cir. Aug. 7, 1973); *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972); *Lewis v. Kugler*, 446 F.2d 1343 (3d Cir. 1971); *Wright v. McMann*, 387 F.2d 519, 524-525 (2d Cir. 1967); *Rivers v. Royster*, 360 F.2d 592 (4th Cir. 1966); *Pierce v. LaVallee*, 293 F.2d 233, 235-236 (2d Cir. 1961) (cited with approval in *Cooper v. Pate*, 378 U.S. 546 (1964); *Clutchette v. Procnier*, 328 F.Supp. 767 (N.D. Cal. 1971); *Carothers v. Follette*, 314 F.Supp. 1014 (S.D. N.Y. 1970). Judge Kaufman remarked in *Wright v. McMann*, *supra*, that "cases involving vital questions of civil rights are the least likely candidates for abstention." 387 F.2d at 525. And Judge Mansfield in *Carothers v. Follette*, *supra*, pointed out that since, as here, the only basis for deciding the case was on federal constitutional grounds, "To abstain, therefore, would merely be to postpone the inevitable." 314 F.Supp. at 1019.

(1968), and *Cooper v. Pate*, 378 U.S. 546 (1964), on the ground that (as in the present case) "none of the state prisoners in those cases was challenging the fact or duration of his physical confinement itself, and none was seeking immediate or more speedy release from that confinement—the heart of habeas corpus." 93 S.Ct. at 1840. The Court also recognized that there are many civil rights cases in which the states have strong interests, yet initial resort to state courts is not required because no specific federal statute, like the habeas statute, requires going first to the state courts. 93 S.Ct. at 1838, n.10. See *McNeese v. Board of Education*, 373 U.S. 668 (1963) (school segregation);¹² *Damico v. California*, 389 U.S. 416 (1967) (welfare problems); *Monroe v. Pape*, 365 U.S. 167 (1961) (police practices).

3. *There is no clearly available comparable state remedy*

Finally, appellants recognize that "the availability of a readily accessible and meaningful state remedy is a prerequisite to the application of the doctrine of abstention" (Appellants' Brief, p. 7, n.2). They assert that California provides such a remedy but, in fact, the availability of an adequate remedy is not at all clear. The state has a "civil death" statute (Penal Code §2600) that apparently disables prisoners from maintaining actions,

¹²In *McNeese*, 373 U.S. at 674, the Court quoted with approval from *Stapleton v. Mitchell*, 60 F.Supp. 51, 55 (D. Kan. 1945):

"We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."

like the present one, for injunctive relief. The only recognized remedy for California prisoners is habeas corpus. While habeas can be used to strike down plainly invalid regulations, see *In re Jordan*, 7 Cal.3d 930, 500 P.2d 873 (1972), appellants have cited no authority indicating that the kind of injunctive relief granted by the district court here—requiring the submission of new regulations that protect the interests of all parties—would be available in California habeas. Further, there are real doubts as to the practical efficacy of the habeas remedy in California. See generally Bergesen, *California Prisoners: Rights Without Remedies*, 25 Stan. L. Rev. 1 (1973).¹³ In short, remitting appellees to the state courts would have caused delay, expense and the probable frustration of finding that no comparable remedy was available—all with no likelihood that the vague regulations could be authoritatively construed to eliminate the constitutional questions.

B. Abstention Should Not Be Ordered Now

Even if abstention would have been appropriate as an initial matter in the district court, assuming the proper

¹³ As one example, there is no clear or adequate provision for pretrial discovery in California habeas, and in fact discovery of the most relevant matters has been denied by the California courts. See Bergesen, *supra*, at 21-22, n. 159; 27-28. But in the present case appellees could not have proved their case without the discovery authorized by the Federal Rules of Civil Procedure. As another example, there is no provision for maintaining a class action in California habeas, but this case was properly brought to obtain class relief under Rule 23 of the Federal Rules. Finally, there has apparently never been a reported case in which a prisoner has prevailed when the facts were in dispute, for the California courts use procedures that virtually guarantee finding the facts against the prisoner. See generally Bergesen, *supra*.

grounds had been timely raised by appellants, it would be pointless to order the court below to "stay its hand" now. As all this Court's abstention cases indicate, the purpose of the doctrine is to avoid the needless confrontation of the state and federal systems. The doctrine is designed to avoid premature federal proceedings—with pleadings, responses by state officials, discovery, hearings on the merits and federal court orders running against state officials. But all this has already happened in the present case. Everything that abstention is designed to postpone has already occurred here—and it occurred without appellants' having urged the grounds for abstention they do in this Court. Moreover, appellants have not complained, either in the district court or in this Court, that any of the new regulations submitted by appellants and approved by the court below do not protect any of their legitimate interests. In these circumstances, when it is impossible to undo everything that has been done without appellants' objection, it would make no sense to order abstention now.

II.

THE DISTRICT COURT PROPERLY INVALIDATED APPELLANTS' FORMER MAIL CENSORSHIP REGULATIONS, AND THE NEW REGULATIONS APPROVED BY THE COURT BELOW FULLY PROTECT EVERY LEGITIMATE INTEREST OF APPELLANTS.

There is no contention in this case that prison officials may not inspect and read prisoner mail; that is not an issue the Court must here resolve. Nor is there any contention that officials may not censor the content of mail to protect prison security. The question is whether there are any limits to their censorship power. The issue

concerns the constitutionality of regulations under which prison guards censor and punish prisoners for the content of their communications—the *words* they use. As will be seen, *infra*, however, the only real controversy in corrections today is *whether* officials should inspect and read mail at all, not what contents should be regulated.

In order to understand precisely what is at issue on this appeal, it is necessary to compare the regulations invalidated by the court below with the regulations given final approval by the court on July 20, 1973 (Supp. A. 194-203). The difference between the former rules and the approved rules constitutes what the court below decided. Comparison of the rules shows that the net effect of the proceedings below was to invalidate the former rules prohibiting prisoners from writing letters in which they "unduly complain," or "magnify grievances" or express "inflammatory political, racial, religious or other views or beliefs," or which are "defamatory" or "are otherwise inappropriate." Except for these provisions, the substance of the former rules survived scrutiny and is contained in the rules given final approval by the court below. Therefore, the question for review here is whether the court below properly invalidated these provisions.¹⁴

¹⁴ Appellants' Brief (pp. 21-22) makes a number of misleading references to regulations that are not at issue here. Thus, the rules prohibiting letters concerning "criminal activity," or "obscene letters," were neither challenged by appellees nor struck down by the court below. The same is true of the ban on "foreign matter" and "display or circulation" of "contraband" when "used to subvert prison discipline." Further, the prohibitions of "escape plans" or plans for producing "explosives," or "behavior which might lead to violence" were neither attacked by appellees nor invalidated by the district court.

The premise of these provisions was that communication by mail is a "privilege," not a "right," which may be granted or withheld in the discretion of prison officials (A. 48,64). We believe this is a faulty premise, for it is clear that the right to communicate by mail is not only guaranteed by the First Amendment, see *Blount v. Rizzi*, 400 U.S. 410, 416 (1971); *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965),¹⁵ but is not lost simply by virtue of imprisonment.¹⁶ In any event, the "right-privilege" distinction has been definitively rejected as an analytic tool in deciding questions of important freedoms.¹⁷

¹⁵ The unanimous decisions in *Blount* and *Lamont* both quoted with approval Mr. Justice Holmes' view that "the use of the mails is almost as much a part of free speech as the right to use our tongues." *Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 437 (1921). See also the opinion of Mr. Justice Brandeis, rejecting the view that use of the mails is merely a privilege and not a right. 255 U.S. at 427.

¹⁶ See, e.g., *Gray v. Creamer*, 465 F.2d 179, 186 (3d Cir. 1972); *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Adams v. Carlson*, 352 F.Supp. 882, 896 (E.D. Ill. 1973); *Palmigiano v. Travisono*, 314 F.Supp. 776 (D. R.I. 1970); *Carothers v. Follette*, 314 F.Supp. 1014, 1023 (S.D. N.Y. 1970); *State ex rel. Thomas v. State of Wisconsin*, 55 Wis.2d 343, 198 N.W.2d 675 (1972); cf. *Neal v. State of Georgia*, 469 F.2d 446, 450 (5th Cir. 1972); see generally Note, *Prison Mail Censorship and the First Amendment*, 81 Yale L. J. 87 (1971); Stern, *Prison Mail Censorship: A Non-Constitutional Analysis*, 23 Hastings L. J. 995 (1972); Singer, *Censorship of Prisoners' Mail and the Constitution*, 56 A.B.A. J. 1051 (1970). Indeed, even appellants profess to recognize the value, from a corrections viewpoint, of relatively free prisoner mail (A. 65—Policy Regarding Mail; Appellants' Brief, p. 23, n. 7).

¹⁷ See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 481-482 (1972); *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Landman v. Royster*, 333 F.Supp. 621, 644-645 (E.D. Va. 1971); *Clutchette v. Proconier*, 328 F.Supp. 767, 779 (N.D. Cal. 1971); *Gilmore v. Lynch*, 319 F.Supp. 105, 108 (N.D. Cal. 1970), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971).

Appellants concede, as they must, that "a prisoner does not shed all his First Amendment rights at the prison gates" (Appellants' Brief, p. 15).¹⁸ But instead of explaining the extent to which prisoners' First Amendment rights must be curtailed because of legitimate penal interests, appellants simply cite the famous dictum from *Price v. Johnston*, 334 U.S. 266, 285 (1948): "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."¹⁹ This begs the question, which is *what* withdrawals or limitations *are* "necessary" because of *what* penal "considerations." Similarly, the "test" proposed by appellants—whether the regulation "lacks support in any rational and constitutionally acceptable concept of a

¹⁸ See *Cruz v. Beto*, 405 U.S. 319 (1972); *Cooper v. Pate*, 378 U.S. 546 (1964); *O'Malley v. Brierley*, 477 F.2d 785 (3d Cir. 1973); *Remmers v. Brewer*, 475 F.2d 52, 54 (8th Cir. 1973); *Gray v. Creamer*, 465 F.2d 179, 186 (3d Cir. 1972); *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969); *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968); *Rowland v. Sigler*, 327 F.Supp. 821 (D. Neb. 1971), *aff'd* 452 F.2d 1005 (8th Cir. 1971); *Fortune Society v. McGinnis*, 319 F.Supp. 901 (S.D. N.Y. 1970); *Palmigiano v. Travisono*, 317 F.Supp. 776 (D. R.I. 1970); *Carothers v. Follette*, 314 F.Supp. 1014, 1023 (S.D. N.Y. 1970); *Hillery v. Procnier*, ___ F.Supp. ___, No. C-71 2150 SW (N.D. Cal. Aug. 16, 1973) (3-judge court); *State ex rel. Thomas v. State of Wisconsin*, 55 Wis.2d 343, 198 N.W.2d 675 (1972).

¹⁹ *Price* had absolutely nothing to do with the rights of prisoners vis-a-vis prison officials. The case actually held that a federal court of appeals has power to order a prisoner brought before the court to argue his own appeal. 334 U.S. at 278, 284. The decision sheds no light on the appropriate standards of judicial review of prison regulations.

prison system"—also begs the question of what is "constitutionally acceptable."

The district court assumed that prisoners' First Amendment rights exist only to the extent that their exercise is consistent with legitimate penal interests. But the record here shows that the censorship rules were not in fact needed to serve any legitimate interest. The court below found that they are not "reasonable and necessary" to serve any such interest, that they are "without any apparent justification" or any "conceivable justification on the grounds of prison security" and that they "would not appear necessary to further *any* of these functions [of prisons in America]." 354 F.Supp. at 1096 (emphasis by the court).

We recognize that First Amendment rights may have legitimate limits in the prison context. As Mr. Justice Powell has explained, "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case." *Healy v. James*, 408 U.S. 169, 180 (1972); see also *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969). Keeping the prison environment in mind, and giving due deference to legitimate penal interests, we submit that the mail censorship provisions involved here are invalid under familiar principles: (1) they are overbroad in that they prohibit lawful and protected expression; (2) they are unduly vague, with the result that standardless and selective enforcement against unpopular causes and prisoners is encouraged; (3) they fail to give fair notice of punishable conduct; and (4) they lack essential procedural safeguards against denial of First Amendment rights through error or arbitrariness.

1. *Overbreadth and Prohibition of Lawful Expression*

The rules invalidated by the district court are not "narrowly drawn" regulations representing "a considered legislative judgment" that particular expression "has to give way to other compelling needs of society." See *Broadrick v. Oklahoma*, ____ U.S. ____, 41 U.S.L.W. 5111, 5114 (1973). The rules do not provide the necessary "sensitive tools" to carry out the "separation of legitimate from illegitimate speech." See *Blount v. Rizzi*, 400 U.S. 410, 417 (1971); *Speiser v. Randall*, 357 U.S. 513, 525 (1958). They disregard the established principle that "government may regulate in the [First Amendment] area only with narrow specificity" and that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." See *NAACP v. Button*, 371 U.S. 415, 433, 438 (1963); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-604 (1967); *United States v. Robel*, 389 U.S. 259, 265 (1967); see generally *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (summary of overbreadth principles and precedents of this Court). They are "overbroad" in that they "sweep unnecessarily broadly and thereby invade the area of protected freedoms." See *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964) (Harlan, J.); see also *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *Grayned v. City of Rockford*, *supra*, 408 U.S. at 114 ("in its reach it prohibits constitutionally protected conduct"); *United States v. Robel*, *supra*, 389 U.S. at 266.

In short, the rules do not narrowly proscribe only expression that falls outside the ambit of the First Amendment. They prohibit a broad range of expression that is clearly entitled to First Amendment protection.

We are not dealing here with obscenity or libel or "fighting words." We are dealing with thoughts expressed in prisoner mail to relatives or friends—mainly outgoing letters, not matters circulated within the walls—that the prison censor disapproves as "unduly complaining," "magnifying grievances" or "otherwise inappropriate."

As one example of the overbroad sweep of these provisions, a principal use of the rules has been to suppress criticism of prison guards and their policies (regardless of whether such criticism is valid). At Folsom Prison officials bluntly announce that letters "criticizing policy, rules or officials" violate the rules, and appellant Procutner testified that rejecting letters for this reason is authorized by the rules (A. 50-52). Letters are rejected for "belittling" staff or "the judicial system" or, indeed, "anything connected with the Department of Corrections" (A. 75). Further, letters "magnify grievances" within the meaning of the rule if they are "belittling the staff because of their incompetency" (*Id.*). Letters may also be rejected for containing "misinformation" or "prison gossip," for being "derogatory to any individuals" or "militant" or merely "inappropriate" (A. 91,92,81-86 and exhibits 1-8 to Morphis dep.). What the censoring guards consider "prison gossip" or "inappropriate" could well be a prisoner's complaint of mistreatment or his fears thereof. As the court below found, the rules can be and are used to suppress prisoner grievances, and this obviously conflicts with the First Amendment rights of expression and to petition for redress of grievances.

This Court has frequently recognized that the First Amendment protects criticism of public officials, even when untrue. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Pickering v. Board of Education*, 391 U.S. 353, 570 (1968); *Near v. Minnesota*, 283 U.S. 697,

710 (1931).²⁰ Here, the rules prohibit such criticism regardless of its truth. This has unfortunately been common in prison mail censorship, but now the lower courts have resoundingly condemned the suppression of prisoners' complaints about official conduct or policies. See *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Sostre v. McGinnis*, 442 F.2d 178, 201 (2d Cir. 1971); *Worley v. Bounds*, 355 F.Supp. 115 (W.D. N.C. 1973); *Adams v. Carlson*, 352 F.Supp. 882, 896 (E.D. Ill. 1973); *Fortune Society v. McGinnis*, 319 F.Supp. 901 (S.D. N.Y. 1970);²¹ *Palmigiano v. Travisono*, 317 F.Supp. 776, 788 (D. R.I. 1970);²² *Carothers v. Follette*, 314 F.Supp. 1014 (S.D. N.Y. 1970); *State ex rel. Thomas v. State of Wisconsin*, 55 Wis.2d 343, 198 N.W.2d 675 (1972) (holding that "letters critical of prison administration

²⁰ In *Near* the Court struck down a statute authorizing injunctions against publishing a "defamatory" newspaper, pointing out that the "previous restraint" was imposed even without proof of the falsity of charges "against public officers of corruption, malfeasance in office, or serious neglect of duty." 283 U.S. at 710. The rules in the instant case similarly prohibit the writing of "defamatory" letters criticizing public officials, regardless of the truth of the criticism.

²¹ In *Fortune Society* the court said:

"Censorship is utterly foreign to our way of life; it smacks of dictatorship. Correctional and prison authorities, no less than the courts, are not above criticism, and certainly they possess no power of censorship simply because they have the power of prison discipline." 319 F.Supp. at 905.

²² In *Palmigiano* the court enjoined even reading prisoner mail because the censorship power was wrongfully being used "to suppress any criticism of the institution or institutional officials." While *Palmigiano* involved prisoners awaiting trial, the officials subsequently entered into a consent decree enjoining all censorship of mail for all prisoners. See *Morris v. Affleck*, No. 4192 (D. R.I. April 20, 1972).

cannot be forbidden because they cause embarrassment or inconvenience to prison authorities"). Thus, the rules prohibiting letters that "unduly complain," "magnify grievances" or that are "defamatory," to the extent they are not unconstitutionally vague (see section 2, *infra*), are overbroad and ban lawful expression.

Another example of overbreadth is the prohibition of "inflammatory political, racial, religious, or other beliefs."²³ It must be remembered that no limiting standards are given to mailroom staff to guide them in deciding whether a letter violates any particular rule. This rule thus bans any "view or belief" that the censor considers, in his unguided discretion, to be "inflammatory." It must also be remembered that we are not dealing with public demonstrations or speeches or communications to be circulated within the prison walls; we are dealing with letters from prisoners to relatives and friends outside the prison. We are unable to understand how such letters could reasonably be called "inflammatory"—except to the censoring guard who finds the views or beliefs distasteful. Even expression that might legitimately be suppressed *inside* the walls cannot be censored from

²³ This is interpreted to ban "derogatory remarks," "offensive language," material that is "discriminatory or derogatory toward any individuals or races," etc. Letters may also be placed in a prisoner's file if they "reveal an inappropriate attitude toward prison staff or society or express radical political views" (A. 21, 29—Admission 7).

The prohibition of "inflammatory . . . views or beliefs" is contained in the general definition of "contraband" and covers letters "when not in the immediate possession of the originator" (see Rule 1205(d) in Exhibit C to Appellants' Brief, and A. 19, 28—Admission 1). This apparently covers not only all incoming mail but also all outgoing prisoners' letters when put in the mail box.

outgoing letters because it obviously would not cause disruption within the prison. By definition, outgoing expression of "views or beliefs" is not "directed to inciting or producing imminent lawless action" and is not "likely to produce such action." Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Any regulation that fails to distinguish between abstract advocacy of unpopular ideas and incitement to action is invalid as overbroad because "it sweeps within its condemnation speech which our Constitution has immunized from governmental control." *Id.* at 448. Lower courts have applied essentially the same principle in prisoner mail cases and have held that officials cannot impose punishment for the contents of letters unless they can show a real danger to prison security.²⁴ In *Sostre v. McGinnis*, 442 F.2d 178, 202 (2d Cir. 1971), *cert. denied sub nom. Sostre v. Oswald*, 404 U.S. 1049 (1971), the court held that a prisoner could not be punished because of his own writings even though the warden (not just a mailroom guard) considered the views "inflammatory," "racist" and insulting. The *Sostre* court, *en banc*, said that sanctioning punishment "would permit prison authorities to manipulate and crush thoughts under the guise of regulation. The intimidating threat of future similar punishment would chill a wide range of prisoner expression, not limited to that expression which [the warden]

²⁴ See *Guajardo v. McAdams*, 349 F.Supp. 211 (S.D. Tex. 1972), *en banc* hearing ordered, 476 F.2d 1285 (5th Cir. 1973); *Palmigiano v. Travisono*, 317 F.Supp. 776 (D. R.I. 1970); *Carothers v. Follette*, 314 F.Supp. 1014, 1025 (S.D. N.Y. 1970); cf. *Goodwin v. Oswald*, 462 F.2d 1237, 1244 (2d Cir. 1972); *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Long v. Parker*, 390 F.2d 816, 822 (3d Cir. 1968); *Brenneman v. Madigan*, 343 F.Supp. 128, 141-142 (N.D. Cal. 1972).

might in fact deem dangerous enough to discipline." 442 F.2d at 202.

In short, the rules involved here, conferring an unchecked censorship power,²⁵ prohibit a wide range of expression that the state has no right to prohibit. But that is only one of their defects.

2. Vagueness

The rules not only, by their own terms, sweep lawful expression within their prohibition; they also suffer from the other vices of overly vague speech regulation. Thus, they discourage legitimate expression because prisoners who wish to obey the rules cannot know what is permitted as opposed to what may be punished. When does a complaint become "unduly complaining"? At what point does stating a grievance become "magnifying grievances"? Will criticism of the prison cook and the food he prepares be considered "defamatory" as "belittling the staff because of their incompetency"? To which mailroom guard will a "political . . . or other view or belief" seem "inflammatory"? How can anyone possibly know what will be considered "otherwise inappropriate"?

These rules are "unduly vague, uncertain and broad" because, *inter alia*, they provide no "ascertainable standard of conduct." *Baggett v. Bullitt*, 377 U.S. 360, 366, 372 (1964). "Standards of permissible statutory vague-

²⁵ In the Court's recent and unanimous decision in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court remarked that

"above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of this forbidden censorship is content control." 408 U.S. at 95, 96.

See also *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970), and authorities cited.

ness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963); *Smith v. California*, 361 U.S. 147, 151 (1959). The Court recently explained the basic principles in *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

"First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning [citations omitted; see section 3, *infra*]. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them [citations omitted]. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application [citations omitted]. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms' [citation omitted], it 'operates to inhibit the exercise of [those] freedoms' [citation omitted]. Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.' [citations omitted]." 408 U.S. at 108-109.

In the present case both the terms of the rules and the means of enforcing them are so imprecise and uncertain that prisoners who do not wish to risk guessing at what will be prohibited are deterred from expressing their true views. "When one must guess at what conduct or utterance" will be punished, "one will 'steer far wider of the unlawful zone . . .'" *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967), quoting from *Speiser v.*

Randall, 357 U.S. 513, 526 (1958); see also *Grayned v. City of Rockford*, *supra*, 408 U.S. at 109; *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964) ("men of common intelligence must necessarily guess at its meaning and differ as to its application").

A further danger in the vagueness of the rules is that they "grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences." *Grayned v. City of Rockford*, *supra*, 408 U.S. at 113, n. 22; see also *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969) (requiring "narrow, objective, and definite standards to guide the licensing authority"); *Cox v. Louisiana*, 379 U.S. 536, 557-558 (1965). Here, the rules delegate "standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights." Cf. *Broadrick v. Oklahoma*, ___ U.S. ___, 41 U.S.L.W. 5111, 5115 (1973).²⁶ It must also be remembered that unlike the cases cited above, the "functionaries" here are not judges, juries or elected public officials; here the arbiter of First Amendment expression is the prison mailroom guard, perhaps not the safest repository of absolute power.²⁷

²⁶ Unlike the situation in *Broadrick* and *United States Civil Service Commission v. National Association of Letter Carriers*, ___ U.S. ___, 41 U.S.L.W. 5122, 5130 (1973), where more specific administrative regulations narrowed the scope of arguably vague statutes, in the present case there are no narrowing standards at all and, indeed, appellant Procunier's testimony (A. 50-52) approving open-ended interpretations of the rules actually expands and compounds their vagueness.

²⁷ "Acton's classic proverb about the corrupting influence of absolute power is true of prison guards no less than of other men." *Landman v. Peyton*, 370 F.2d 135, 140 (4th Cir. 1966) (Sobeloff, J.).

A related consideration is that the vagueness of the rules "lends itself to selective enforcement against unpopular causes." *NAACP v. Button*, 371 U.S. 415 435 (1963); see also *Grayned v. City of Rockford*, *supra*, 408 U.S. at 108-109. The rules furnish prison censors with "a convenient tool for 'harsh and discriminatory enforcement . . . against particular groups deemed to merit their displeasure.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). Since the censor is "adrift upon a boundless sea" in approving various views, there is an "inevitable tendency to ban the expression of unpopular sentiments." See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504-505 (1952). Indeed, as the record here shows, the censoring guards have used the broad rules against what must be, for them, the most unpopular cause of all—prison reform. Thus, the rules against letters that "unduly complain" or "magnify grievances" or are "defamatory" or "otherwise inappropriate" have been used principally to suppress criticism of officials and prison policy. The vagueness of the rules makes it a practical impossibility to enforce them evenhandedly, "resulting in virtually unreviewable prior restraints on First Amendment rights." Cf. *Broadrick v. Oklahoma*, *supra*, 41 U.S.L.W. at 5115.

3. No Fair Notice of Punishable Conduct

Violation of the mail rules can result in a disciplinary report and severe disciplinary punishment up to and including confinement in segregation.²⁸ But they author-

²⁸ Appellants complain in their Brief (pp. 22-23) of the district court's failure to distinguish the consequences of violation of the rules, stating that "considerations which might justify rejection of a letter might well not justify the taking of disciplinary action." It

ize punishment without giving fair notice of what is prohibited, and this violates due process of law. See *Grayned v. City of Rockford*, *supra*, 408 U.S. at 108-109; *Papachristou v. City of Jacksonville*, *supra*; *Baggett v. Bullitt*, *supra*, 377 U.S. at 367; *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *Landman v. Royster*, 333 F.Supp. 621, 654-656 (E.D. Va. 1971).²⁹ There is no possible way for a prisoner to know when a guard may consider his letter to "unduly complain," or as too critical or as "otherwise inappropriate," etc. Forcing prisoners to "guess at the meaning" of these vague rules, on pain of severe disciplinary punishment, cannot be squared with due process. See *Landman v. Royster*, *supra*; cf. *Keyishian v. Board of Regents*, *supra*, 385 U.S. at 604; *Baggett v. Bullitt*, *supra*.

is true that the availability of "less drastic means" to serve a state interest may indicate the invalidity of a regulation, *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); see also *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101, n. 8 (1972); *United States v. Robel*, 389 U.S. 258, 268 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 602 (1967); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-308 (1964), and this principle has obvious application to prison censorship rules, Note, *Prison Mail Censorship and the First Amendment*, 81 Yale L.J. 87, 94-105 (1971). But it is not for the district court to specify what consequences should attend what violations of appellants' rules. The rules indiscriminately authorize punishment, or lesser consequences, for *any* violation, at the option of the censoring guard. The rules' failure to curb this absolute discretion is what the district court found invalid. In any event, the rules given final approval by the court do distinguish among consequences and thus eliminate appellants' objection (Supp. A. 198, 202-203).

²⁹ As cases like *Baggett* and *Landman* indicate, it makes no difference for due process purposes that the punishment is administrative and not criminal. Cf. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

4. *Absence of Procedural Safeguards*

Appellants' mail censorship rules are a classic example of a "prior restraint" on expression. This Court has declared that any system of prior restraint is presumptively invalid and bears a "heavy burden" of justification. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); see also *Healy v. James*, 408 U.S. 169, 184 (1972). Nor is there any reason why principles disfavoring prior restraints should not be applied to prison mail censorship. See generally Note, *Prison Mail Censorship and the First Amendment*, 81 Yale L.J. 87, 105-111 (1971). Even if prisoners' freedom of written expression may be limited by rejecting letters under narrowly drawn rules, censorship procedures are invalid "unless they include built-in safeguards against curtailment of constitutionally protected expression . . ." *Blount v. Rizzi*, 400 U.S. 410, 416 (1971); cf. *Freedman v. Maryland*, 380 U.S. 51 (1965); *Speiser v. Randall*, 357 U.S. 513, 521 (1958). In the prison context it would not be necessary to have judicial review, with the burden of proof on the censor; but some elementary safeguards against administrative error or arbitrariness are clearly required. Very simple procedures were prescribed by the court below, 354 F.Supp. at 1097, and by other courts in similar cases. See *Guajardo v. McAdams*, 349 F.Supp. 211 (S.D. Tex. 1972), hearing en banc ordered, 476 F.2d 1285 (5th Cir. 1973); *Sostre v. Otis*, 330 F.Supp. 941, 944-946 (S.D. N.Y. 1971); cf. *Laaman v. Hancock*, 351 F.Supp. 1265 (D. N.H. 1972); *Burnham v. Oswald*, 342 F.Supp. 880 (W.D. N.Y. 1971). In response to the decision below, appellants proposed new rules providing for notice of disapproved letters and an administrative review (Supp. A. 197-198). These were approved as satisfying the district court (Supp. A. 211-212), and appellants have

not complained either below or in this Court that the new rules leave any of their legitimate interests unprotected.

* * *

In short, the rules involved in this case violate all the applicable principles for permissible regulation of expression. In any other context they would be swiftly condemned. The question, then, is whether the district court erred in condemning them in the present case. We submit that appellants have failed utterly to suggest any valid reason why such gross departures from settled principles should be permitted here. We further submit that the regulations given final approval by the court below fully protect every legitimate interest of appellants—and appellants have not asserted the contrary.

Again keeping in mind that First Amendment principles are applied "in light of the special characteristics of the . . . environment," *Healy v. James*, 408 U.S. 169, 180 (1972); *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969), we submit that the general principles are sufficiently flexible to deal with administrative rules of correctional agencies, just as they are with all other governmental agencies. Of course, the results in particular cases will often be different because in many prisoner cases the officials will be able to justify certain restrictions by showing that "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation' " of the prison. Cf. *Healy, supra*; *Tinker, supra*, 393 U.S. at 509. But such a showing must be "factually supported by the record." Cf. *Healy, supra*, 408 U.S. at 188; *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Pickering v. Board of Education*, 391 U.S. 353, 570-573 (1968). Justification for extraordinary restrictions on the rights of individuals cannot be presumed. There must be evidence of likely interference with a legitimate correc-

tional interest.³⁰ And there must be a showing that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Cf. *Healy, supra*, 408 U.S. at 189-190, n. 20; *Grayned v. City of Rockford*, 408 U.S. 104, 116-117 (1972) ("the regulation must be narrowly tailored to further the State's legitimate interest"); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101, n. 8 (1972).³¹

Does the record in the present case support the substantial inroads on these principles claimed by appellants as "within the discretion of prison administrators"?

³⁰ "In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker, supra*, 393 U.S. at 508. In *United States v. Savage*, ___ F.2d ___, No. 72-3145 (9th Cir. Aug. 8, 1973), the Ninth Circuit, relying on the district court decision in this case, held that interception of a prisoner letter was unconstitutional "absent a showing of some justifiable purpose of imprisonment or prison security."

³¹ See also *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *United States v. Robel*, 389 U.S. 258, 268 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 602, 609 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Specifically applying this principle in prisoners' rights cases, see *O'Malley v. Brierley*, 477 F.2d 785, 796 (3d Cir. 1973); *McDonnell v. Wolff*, ___ F.2d ___, No. 72-1331 (8th Cir. Aug. 2, 1973); *Goodwin v. Oswald*, 462 F.2d 1237, 1244 (2d Cir. 1972); *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969); *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968); *Rowland v. Sigler*, 327 F.Supp. 821 (D. Neb. 1971), *aff'd* 452 F.2d 1005 (8th Cir. 1971); *Hillery v. Proconier*, ___ F.Supp. ___, No. C-71 2150 SW (N.D. Cal. Aug. 16, 1973) (3-judge court); *State ex rel. Thomas v. State of Wisconsin*, 55 Wis.2d 343, 198 N.W.2d 675 (1972).

As the court explains in *Hillery v. Proconier, supra*, the analysis of Judge Mansfield in *Carothers v. Follette*, 314 F.Supp. 1014, 1024 (S.D. N.Y. 1970), is consistent with the above analysis: "That is, not only must the state show a compelling interest in limiting the prisoners' rights, but the *method* it chooses to effect the limitation must be related—'reasonably and necessarily'—to the end sought." (slip op. at 11; emphasis by the Court).

In this case appellants presented *no* evidence, not even their own opinions, to show any legitimate justification for the rules in question. Assuming that they had some legitimate interest, they did not show that less restrictive means would be ineffective to protect it. On this record, there is "no plausible basis" for their action. *Carothers v. Follette*, 314 F.Supp. 1014, 1024 (S.D. N.Y. 1970); accord *Worley v. Bounds*, 355 F.Supp. 115 (W.D. N.C. 1973); *Adams v. Carlson*, 352 F.Supp. 882, 896 (E.D. Ill. 1973).³² The findings of the court below are unassailable: that the rules are not "reasonable and necessary," are "without any apparent justification" or any "conceivable justification on the grounds of prison security" and "would not appear necessary to further *any* of these functions [of prisons in America]." 354 F.Supp. at 1096 (emphasis by the court).

The record is barren of any justification for appellants' rules. Even if we look elsewhere for empirical justification for appellants' censorship rules, we can find none. All the secondary material is to the contrary. Thus, it is generally recognized that the sole purpose served by prison mail censorship is to protect the security of the institution by preventing the introduction of contraband (drugs, weapons, cash, etc.) and the formation of escape or criminal plans. See generally, California Board of

³² The need for prison officials to introduce *evidence* of justification, rather than rely on courts to speculate, was well explained by the Fourth Circuit:

"[p]rison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions, and they are not always disinterested persons in the resolution of prison problems. We do not denigrate their views but we cannot be absolutely bound by them." *Brown v. Peyton*, 437 F.2d 1228, 1232 (4th Cir. 1971).

Corrections, *California Correctional System Study: Institutions*, 40 (July, 1971) (the "Keldgord Report"). The comprehensive Keldgord Report sharply criticized appellants' mail censorship policy on practical grounds, stating that "it is senseless to do pointless things." The Report pointed out that it might make sense to inspect incoming mail for contraband, "but the practice of reading everything that goes in and out is unnecessary and wasteful, and fosters inmate resentment." *Id.* Indeed, as to "rehabilitating" prisoners, it is as likely that mail censorship impedes rehabilitation as that it furthers it. See Note, *Prison Mail Censorship and the First Amendment*, 81 Yale L.J. 87, 103 (1971), and authorities cited therein; see also Note, *The Right of Expression in Prison*, 40 S. Cal. L. Rev. 407 (1967); Singer, *Censorship of Prisoner Mail and the Constitution*, 56 A.B.A.J. 1051 (1970); Stern, *Prison Mail Censorship: A Non-Constitutional Analysis*, 23 Hastings L.J. 995 (1972). In short, all the commentators urge that there be no censorship of content at all. The decision below, which continues to authorize censorship, begins to appear quite conservative.

A growing number of decisions have found, on the evidence in those cases, that the prison officials have no legitimate interest in censoring outgoing mail and have enjoined such censorship. In *Guajardo v. McAdams*, 349 F.Supp. 211 (S.D. Tex. 1972), hearing en banc ordered, 476 F.2d 1285 (5th Cir. 1973), the court found that "total censorship serves no rational deterrent, rehabilitative of prison security purposes." The court therefore enjoined all censorship of outgoing mail; incoming letters could be rejected only if they contained specific enumerated contents (e.g. escape plots, codes, contraband, etc.) and if the prisoner was afforded a fair opportunity to protest any rejection. Accord, *Lamar v. Kern*, 349

F.Supp. 222 (S.D. Tex. 1972); *Gates v. Collier*, 349 F.Supp. 881, 898-899 (N.D. Miss. 1972); *Palmigiano v. Travisono*, 317 F.Supp. 776 (D. R.I. 1970).³³

Aside from judicial inquiries, responsible correctional authorities themselves have recently examined prison mail censorship practices and have found them quite unnecessary and even counterproductive. The prestigious National Advisory Commission on Criminal Justice Standards and Goals, which is composed of the country's outstanding authorities in the field and was formed to advise the federal Law Enforcement Assistance Administration on standards in making its grants, promulgated its *Standards* in January, 1973. *Standard* 2.15, on Free Expression and Association, unequivocally rejects the views advanced by appellants' lawyers as unsound correctional practice. Specifically on mail censorship, *Standard* 2.17 flatly provides that "neither incoming nor outgoing mail should be read or censored." For the convenience of the Court, we have reproduced the pertinent excerpts from the *Standards* and their commentary in the Appendix to this brief, *infra*.

In addition, the Center for Criminal Justice of the Boston University School of Law has recently developed and published the *Model Rules and Regulations on Prisoners' Rights and Responsibilities* (1973). *Rules* IC-1 and IC-2 provide for unread and uncensored correspondence, absent exceptional circumstances. That the *Model*

³³ In addition, many states have voluntarily abandoned all censorship. See, e.g., Michigan Department of Corrections, Departmental Directive CC-10 (Oct. 17, 1972) (reported at 2 Prison Law Rptr. 177), stating that prisoners are "permitted to send uncensored sealed letters to any person or organization." See also Washington Office of Adult Corrections, Memorandum No. 70-5 (Nov. 6, 1970); Pennsylvania Bureau of Correction, Administrative Directive No. 3 (effective Dec. 15, 1970).

Rules do not represent just an idealist's notion of prisoners' rights is illustrated by the Foreward; the Commissioner of Corrections of Massachusetts states that the Rules are "a long overdue instrument for the development of sound correctional policy," provide "a viable blueprint from which a sound correctional management system can be constructed," and are "an invaluable tool" for correctional administrators striving to build "systems that operate fairly, thoroughly, and effectively."

In other words, the only real controversy in corrections today concerns whether mail should be read at all, not what contents should be censored or punished. That is not an issue the Court must now resolve, but it surely indicates that appellants have failed to show any persuasive reasons for the overbroad, vague and restrictive rules involved in this case. Appellants have not identified any provision of the rules finally approved by the district court on July 20, 1973 (Supp. A. 194-203), that they claim does not adequately protect legitimate state interests. We submit that their interests are more than adequately protected by the approved rules; and the judgment below should be affirmed.

III.

THE DISTRICT COURT PROPERLY INVALIDATED APPELLANTS' FORMER ABSOLUTE PROHIBITION AGAINST USE BY ATTORNEYS OF LAW STUDENT OR PARALEGAL INVESTIGATORS TO INTERVIEW PRISONERS ON THEIR BEHALF, AND THE NEW REGULATION APPROVED BY THE COURT BELOW FULLY PROTECTS EVERY LEGITIMATE INTEREST OF APPELLANTS

Once again, in order to understand what is at stake on this appeal, it is necessary to compare the former rule

invalidated by the district court with the rule given final approval on July 20, 1973.³⁴ Only then can it be seen exactly what the court decided and what appellants have actually been ordered to do. The former rule authorized attorneys representing prisoners to use investigators for interviewing prisoners, but limited the class to state-licensed investigators and members of the State Bar—and no others. Thus, an attorney could not even send a student or assistant as a messenger to have papers signed. As appellants state (Brief, p. 24), after the decision below but before the final order, they voluntarily opened the class to include law students certified under the rules of the State Bar. This is reflected in the final order (Supp. A. 198). The only other addition to the class of the former rule consists of "legal paraprofessionals certified by the State Bar or other equivalent legal professional body and sponsored by the attorney of record" (*Id.*). At the present time there is *no* paraprofessional certification procedure by the State Bar or, so far as we are aware, by any other legal professional body in California.³⁵

³⁴ Appellants' Brief seriously misrepresents the record and distorts the issue presented. Although their Brief was filed about a month after the district court's final order of July 20, 1973 (Supp. A. 211-212), appellants fail to mention the provisions of that order and make a number of misleading and erroneous assertions about what the court below ordered. Thus, appellants state (p. 24-25) that they were ordered to include *all* full-time legal assistants among the class of attorneys' investigators authorized to interview prisoners. In their statement of the Question Presented (p. 2), they claim the class includes "full time lay employees" of attorneys. They further state (p. 26-27) that "all law students" and "other paraprofessionals" must be accorded all "attorney's privileges." These assertions are untrue.

³⁵ In July 1973, the California State Bar issued a report *recommending* the adoption of a comprehensive new statute, to be entitled the "Certified Attorney Assistant Act", which would set

Accordingly, appellants are not now required to admit *any* paraprofessionals as investigators. The only law students they must admit are those receiving State Bar certification, and appellants took this step voluntarily and not by court order. Finally, it is misleading for appellants to emphasize that they were ordered to permit "confidential" communications by "non-attorneys", because the issue tried below was whether appellants may arbitrarily bar all law students and paralegal persons from acting on behalf of attorneys, not whether all such communications must be confidential.³⁶ In summary, the relief actually ordered by the district court is very narrow and should, under the precedents in this Court and on the record here, be affirmed.

The constitutional prohibition against depriving a person of liberty without due process of law has, as a necessary corollary, the requirement that prisoners be

up standards for certifying legal assistants. State Bar of California, *Reports* (July, 1973). The recommendation was based on detailed investigation and a finding that "Increased use by lawyers of the services of legal assistants will be necessary in order for members of the State Bar to continue to furnish quality legal services to the public at reasonable cost." *Id.* at 2. Directly applicable to the present case was the Bar's finding that "As lawyers become more efficient and extend their abilities through the use of well-trained Certified Attorney Assistants, additional thousands of persons will receive quality legal services in situations where *they otherwise would not have received legal assistance at all.*" *Id.* at 4. (emphasis added)

³⁶ We assume that the attorney-client privilege of California Evidence Code §952 would cover communications between prisoners and attorneys' investigators. But appellants' rule finally approved by the court below omitted, over appellees' objection, the word "confidential", thus creating a possible ambiguity as to appellants' understanding of what they have been ordered to do (see Supp. A. 209).

afforded access to the courts to set aside convictions obtained in violation of their federal constitutional rights or to remedy invasions of their constitutional rights while incarcerated.³⁷ It has long been clear that this paramount right of prisoner access to the courts to present their constitutional claims invalidates prison regulations which effectively impair that right. *Ex parte Hull*, 312 U.S. 546 (1941). Not only may state officials not obstruct access to the courts, but "due process requires, at a minimum, that *absent a countervailing state interest of overriding significance*, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (emphasis added). The Court in *Boddie*, relying on precedents established in the criminal defense context, reasoned that where the "judicial proceeding becomes the only effective means of resolving the dispute at hand . . . denial of a defendant's full access to that process raises grave problems for its legitimacy."³⁸

In *Johnson v. Avery*, 393 U.S. 483 (1969), the Court recognized that effective access to the courts for many

³⁷ See, e.g., *Kaufman v. United States*, 394 U.S. 217, 226 (1969); *Johnson v. Avery*, 393 U.S. 483 (1969); *Mooney v. Holohan*, 294 U.S. 703, 713 (1935); see also *McDonnell v. Wolff*,

F.2d ___, No. 72-1331 (8th Cir. Aug. 2, 1973); *Nolan v. Scafati*, 430 F.2d 548, 551 (1st Cir. 1970); *Landman v. Royster*, 333 F.Supp. 621, 656 (E.D. Va. 1971); *Cross v. Powers*, 328 F.Supp. 899, 901 (W.D. Wis. 1971). The Seventh Circuit's recent decision in *Adams v. Carlson*, ___ F.2d ___, 13 Cr. L. Rptr. 2532 (7th Cir. Aug. 23, 1973), contains a useful analysis of restrictions on prisoner access to the courts.

³⁸ *United States v. Kras*, 409 U.S. 434 (1973), does not limit the application of *Boddie* to this case, for here, like *Boddie* and unlike *Kras*, a "judicial proceeding" is "the only effective means" of challenging a prisoner's conviction or sentence or the constitutionality of his treatment while in prison.

prisoners is meaningless unless some form of legal assistance is provided. The Court emphasized that "for the indigent as well as for the affluent prisoner, post-conviction proceedings must be more than a formality." 393 U.S. at 486. The Court held that unless "the state provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief" it may not bar inmates from furnishing assistance to other inmates. Mr. Justice White, dissenting, would not have struck down the anti-prisoner assistance regulation but would have ruled in a proper case that "the state must provide access to the courts by insuring that those who cannot help themselves have reasonably adequate assistance in preparing their post-conviction papers." 393 U.S. at 502. Indeed, Mr. Justice White's opinion in *Johnson* states what is basically at stake in the instant case:

"The illiterate or poorly educated and inexperienced indigent cannot adequately help himself and . . . unless he secures aid from some other source he is effectively denied the opportunity to present to the courts what may be valid claims for post-conviction relief." 393 U.S. at 498.

In *Younger v. Gilmore*, 404 U.S. 15 (1971), this Court affirmed a decision requiring California prisons to provide law libraries or other means of meeting the legal needs of prisoners. *Gilmore v. Lynch*, 319 F.Supp. 105 (N.D. Cal. 1970). If state officials are required to take affirmative action or adopt expensive programs to provide adequate legal resources, as in *Gilmore*, it follows, *a fortiori*, that they may not maintain regulations that arbitrarily preclude the use of available legal assistance in the representation of prisoners.

This Court's decisions in *Gilmore*, *Boddie* and *Johnson*, and the earlier decisions in *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. California*, 372 U.S. 353

(1963), teach that the states cannot deny to indigents the necessary means for obtaining a fair hearing of their possibly valid constitutional claims. The Court's decisions have recognized practical reality not merely by striking down absolute barriers to the courts but by declaring that *effective* access to the judicial process is required when fundamental interests like liberty are at stake. For example, in *Douglas*, as here, the prisoner was not totally barred from filing his appeal; and in *Johnson*, as here, he was not totally barred from filing his writ. But in both cases, as here, the state practice prevented *effective* use of the judicial process. In *Gilmore*, the State was required to take affirmative action to assure access to the courts. Jailhouse lawyers were permitted by *Johnson* because of the function they serve—as tools enabling prisoners to bring their claims before the courts. Mr. Justice White noted in *Johnson* that “unless the help the indigent gets from other inmates is reasonably adequate for the task, he will be as surely and effectively barred from the courts as if he were accorded no help at all.” 393 U.S. at 499. As foreseen, the district court in the present case found that other tools are needed as well. Just as the paramount interest in making the courts fully available for the resolution of constitutional claims compelled the results in *Johnson* and *Gilmore*, it requires affirmance of the decision in the present case. Post-conviction remedies theoretically available to all in California are not in fact available if the State denies indigents available legal assistance to use them. Because the State denies the prisoner both his livelihood (e.g., to hire a lawyer or a private investigator) and his liberty (e.g., to consult a public defender or an OEO legal services attorney and their paralegal assistants), the State has erected very effective barriers to the judicial process—unless the State permits available alternative sources of legal help.

Access to the courts necessarily involves the right to seek and receive assistance from attorneys. The courts have consistently invalidated action by prison officials that impeded communication and consultation either by mail or in person.³⁹

While appellants argue that their rule in this case, completely forbidding the use of law students or paralegals for interviewing, does not impair access to the courts,⁴⁰ the uncontested evidence on which the court below based its findings of fact was that the rule, in conjunction with the remoteness of most California prisons, "makes personal visits to inmate-clients so time consuming and inconvenient that attorneys are reluctant to make such visits." 354 F.Supp. at 1098. Preparation of this case was itself hindered and delayed because appellants refused to permit counsel for appellees to use supervised law students to interview their clients (Supp. A. 186). The court below concluded that the rule arbitrarily denied necessary legal assistance to indigent prisoners.

³⁹ See, e.g., *McDonnell v. Wolff*, ___ F.2d ___, No. 72-1331 (8th Cir. Aug. 2, 1973), *aff'd* 342 F.Supp. 616 (D. Neb. 1972); *LeVier v. Woodson*, 443 F.2d 360 (10th Cir. 1971); *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970); *Coleman v. Peyton*, 362 F.2d 905, 907 (4th Cir.), *cert. denied*, 385 U.S. 905 (1966); *cf.* *Moore v. Ciccone*, 459 F.2d 574 (8th Cir. 1972); *Smith v. Robbins*, 454 F.2d 696 (1st Cir. 1972); *Morales v. Turman*, 326 F.Supp. 677 (E.D. Tex. 1971); *Marsh v. Moore*, 325 F.Supp. 392, 395 (D. Mass. 1971); *In re Jordan*, 7 Cal.3d 930 (1972). In *Adams v. Carlson*, ___ F.2d ___, 13 Cr. L. Rptr. 2532 (7th Cir. Aug. 23, 1973), a case quite analogous to the present one, the Seventh Circuit recently struck down a prison restriction requiring attorneys to interview their clients through a screen, reasoning that the restriction unjustifiably interfered with the ease of personal interviewing.

⁴⁰ Appellants' contention that there is no right to appointed counsel in post-conviction matters completely misses the point. Indeed, as the Court recognized in *Johnson v. Avery*, 393 U.S. 483, 489, 490 (1969), the fact that state-provided attorneys are not generally available in these matters increases the need for law student, paralegal and other voluntary assistance.

As the record shows and as is obvious, attorneys simply cannot agree to represent very many prisoners, with little or no compensation, if they must take full days to journey to remote California prisons personally to interview clients or prospective clients. Denying the right to use law students or paralegal interviewers means, in many cases, the difference between the prisoner having counsel and not having counsel. "[T]he inmate's ability to present his case to the court necessarily suffers substantially from the absence of professional representation." 354 F.Supp. at 1098.

In attempting to give a prisoner effective representation, or in seeking the information required to advise him intelligently, an attorney may need the services or assistance of others. In recent years lawyers have come to rely more and more on the aid of paraprofessionals whom they have trained and who, working under their supervision, are a vital part of the legal team.

The use of paraprofessionals has received little attention from the courts, but has been encouraged by many professional organizations, including the American Bar Association. The new Code of Professional Responsibility adopted by the ABA specifically permits a lawyer to delegate tasks to lay persons:

"A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently." Canon 3, Ethical Consideration 3-6.

In a speech before the National Conference on the Judiciary at Williamsburg in 1971, President Nixon said that "We should open our eyes—as the medical profession

is doing—to the use of paraprofessionals in the law.” N.Y.L.J., March 12, 1971, p. 4. See also Brickman, *Expansion of the Lawyering Process Through A New Delivery System: The Emergence and State of Legal Paraprofessionalism*, 71 Col. L. Rev. 1153 (1971).

If the use of paraprofessionals is merely desirable as a general matter, it is absolutely essential if prison inmates are to receive vital assistance in obtaining access to the courts. Most prisoners are indigent, and lack the funds needed to retain a lawyer or even to pay for a single interview. They are dependent on the assistance of attorneys and organizations willing and able to represent them without fee. The supply of attorneys able to serve in this capacity is obviously limited. See *Johnson v. Avery*, *supra*, 393 U.S. at 494; *cf. In re Tucker*, 5 Cal.3d 171, 183 (1971). Courts and commentators have recognized that providing indigent prisoners with essential legal services is a burdensome problem to the Bar, and have concurred in recommending the utilization of laymen and law students to help fill the gap. See, e.g., *Johnson v. Avery*, *supra*, 393 U.S. at 489, 498;⁴¹ *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972);⁴² *Novak v. Beto*, 453 F.2d 661, 664 (5th Cir. 1971) (encouraging any source of legal assistance to prisoners, “whether it be licensed or unlicensed to practice law”); *Hooks v. Wainwright*, 352 F.Supp. 163 (M.D. Fla. 1972); *Gilmore v. Lynch*, 319 F.Supp. 105, 110 (N.D. Cal. 1970), *aff’d sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971); Jacob &

⁴¹ “The cooperation and help of laymen, as well as of lawyers, is necessary if the right of ‘[r]easonable access to the courts’ is to be available to the indigents among us.” (Douglas, J., concurring).

⁴² “Law students as well as practicing attorneys may provide an important source of legal representation for the indigent” (Brennan, J., concurring).

Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 493 (1970).

Using law students and paralegal persons in counseling prisoners saves attorneys the considerable time that is required by personal visits to distant institutions and in waiting even at nearby prisons (Supp. A. 184-186). Following an attorney's detailed instructions, a paraprofessional assistant can obtain essential facts from the prisoner, and transmit the attorney's advice or recommendations to him.⁴³ Communication by mail is no substitute for personal communication, where careful questioning can elicit the essential relevant facts that few prisoners are able to present on their own.⁴⁴ Obtaining the same complete details by mail is often impossible, or requires a prolonged exchange of queries and responses. Nor does the mail permit the assessment of credibility, an essential element in any decision whether to render voluntary assistance.

The American Bar Association recognizes the value of using law student services for these purposes, stating that the lawyer

⁴³ Appellants' rule permits visits by state-licensed investigators, but their services are of course unavailable to indigent inmates who cannot pay their fees. Moreover, their aid is less valuable in this context than that of the paraprofessional who works closely with the attorney, and whose training is directed toward awareness of specific legal issues.

⁴⁴ "[T]he most important part of a legal assistance plan is not the law books or library, or the availability of decisions, but the opportunity to consult with an attorney, or at least a person of good common sense and experience who can, in a straightforward and complete manner, set forth the inmate's claim in understandable fashion." *Stevenson v. Mancusi*, 325 F.Supp. 1028, 1032 (W.D. N.Y. 1971).

"... may avail himself of the assistance of the law student in many of the fields of the lawyer's work, such as examination of case law finding and interviewing witnesses, ... delivering papers, conveying important messages, and other similar matters." Canon 3, Ethical Consideration 3-6, footnote 3.

The *Rules for Practical Training of Law Students* promulgated by the California State Bar Board of Governors⁴⁵ authorize supervised law students to engage in a wide range of activities including

"Conducting investigations and interviewing clients and witnesses for the purpose of ascertaining facts and informing the supervising lawyer thereof." Rule VII.C.

But none of these activities was permitted by appellants.

There is no dispute as to the need to utilize law students to assist California prisoners. Indeed, many law school programs authorized by appellants send substantial numbers of students into the prisons (A. 61-62). The students in such programs, however, are not closely supervised by attorneys and could not meet the standards of State Bar certification of law students (A. 113-114; A. 35-36; A. 62; Supp. A. 188). Nor do appellants make any inquiry into the students' qualifications or subject them to any security clearance (A. 62). This shows the arbitrariness of appellants' rule involved here, which allows interviews by essentially unsupervised students in school programs while flatly prohibiting interviews by law student assistants closely supervised by attorneys. The rule also arbitrarily discriminates against law students supervised by attorneys with organizations like the NAACP Legal Defense Fund or the American Civil

⁴⁵ State Bar of California *Reports* (Feb. 1970).

Liberties Union, since such organizations often deal with problems outside the scope of the school programs—e.g., problems of prison reform such as the instant case.

Appellants' rule prohibiting interviews by paralegal assistants, especially law students, thus excludes a significant source of legal assistance to prisoners. As the California Bar found, n. 35, *supra*, and as the record here shows (A. 126-130), there is a growing supply of highly trained and academically qualified paralegal personnel. See also Larson, *Legal Paraprofessionals: Cultivation of a New Field*, 59 A.B.A.J. 631 (1973) (Minnesota program). But these persons are completely barred by appellants' rule. In view of the unmet need for legal assistance, the rule is an invalid infringement on the fundamental right of access to the courts. See *Younger v. Gilmore*, 404 U.S. 15 (1971); *Johnson v. Avery*, 393 U.S. 483 (1969); *Mead v. Parker*, 464 F.2d 1108, 1110 (9th Cir. 1972). In *Johnson v. Avery*, *supra*, this Court acknowledged a danger to prison discipline presented by "jailhouse lawyers" but nevertheless held invalid a regulation barring them from assisting other prisoners seeking access to the courts. 393 U.S. at 488. Surely the burden of justifying a prohibition against consulting trained and supervised assistants to lawyers should be at least as great as the burden of justifying a bar against consulting an untutored "jailhouse lawyer."⁴⁶

⁴⁶ The courts have uniformly held that the burden of justifying a rule impairing access to the courts rests on the prison officials, not the prisoners. See, e.g., *McDonnell v. Wolff*, ___ F.2d ___, No. 72-1331 (8th Cir. Aug. 2, 1973); *Novak v. Beto*, 453 F.2d 661, 664 (5th Cir. 1971); *Wainwright v. Coonts*, 409 F.2d 1337, 1338 (5th Cir. 1969); *Van Erman v. Schmidt*, 343 F.Supp. 337, 379 (W.D. Wis. 1972); *Cross v. Powers*, 328 F.Supp. 899, 904 (W.D. Wis. 1971).

The district court gave more than adequate deference to any legitimate interest of appellants. It accepted without scrutiny the offhand opinion of appellant Pro-cunier (A. 63-64), that uncontrolled use of investigators created security problems by letting in "some people we chose not to have in our institutions". There was no proof of involvement of unlicensed investigators in any incidents (A. 63; A. 35-36—answer to interrogatory 7), and no showing of even a "very distant possibility of harm" arising from their admission to prisons. Cf. *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 223 (1967). Certainly there was nothing to indicate that use of closely supervised and Bar-certified students or paraprofessionals would interfere with any legitimate interest of appellants. The final order of the district court imposes stringent safeguards on the use of paralegals (Supp. A. 198-200). The relief ordered by the Court below was the most restrained possible, and appellants have offered no reason for overturning it.

In the only other case squarely in point, *Arif v. McGrath*, No. 71-C-1388 (E.D. N.Y. Dec. 9, 1971), the court held that the New York City Department of Corrections had impaired the prisoners' right to counsel by refusing to allow them to consult with their attorney's non-admitted assistants. The court found that consultation with lay assistants was necessary to implement "the right of parties in the federal courts to conduct their case 'personally or by counsel'. 28 U.S.C. Section 1654." (slip opinion pp. 21-22). It ordered the defendants to "permit visits to the plaintiffs by law students, law school graduates or investigators authorized in writing by their attorneys" and directed them not to "monitor or eavesdrop on such visits." (slip op. p. 23).

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted,

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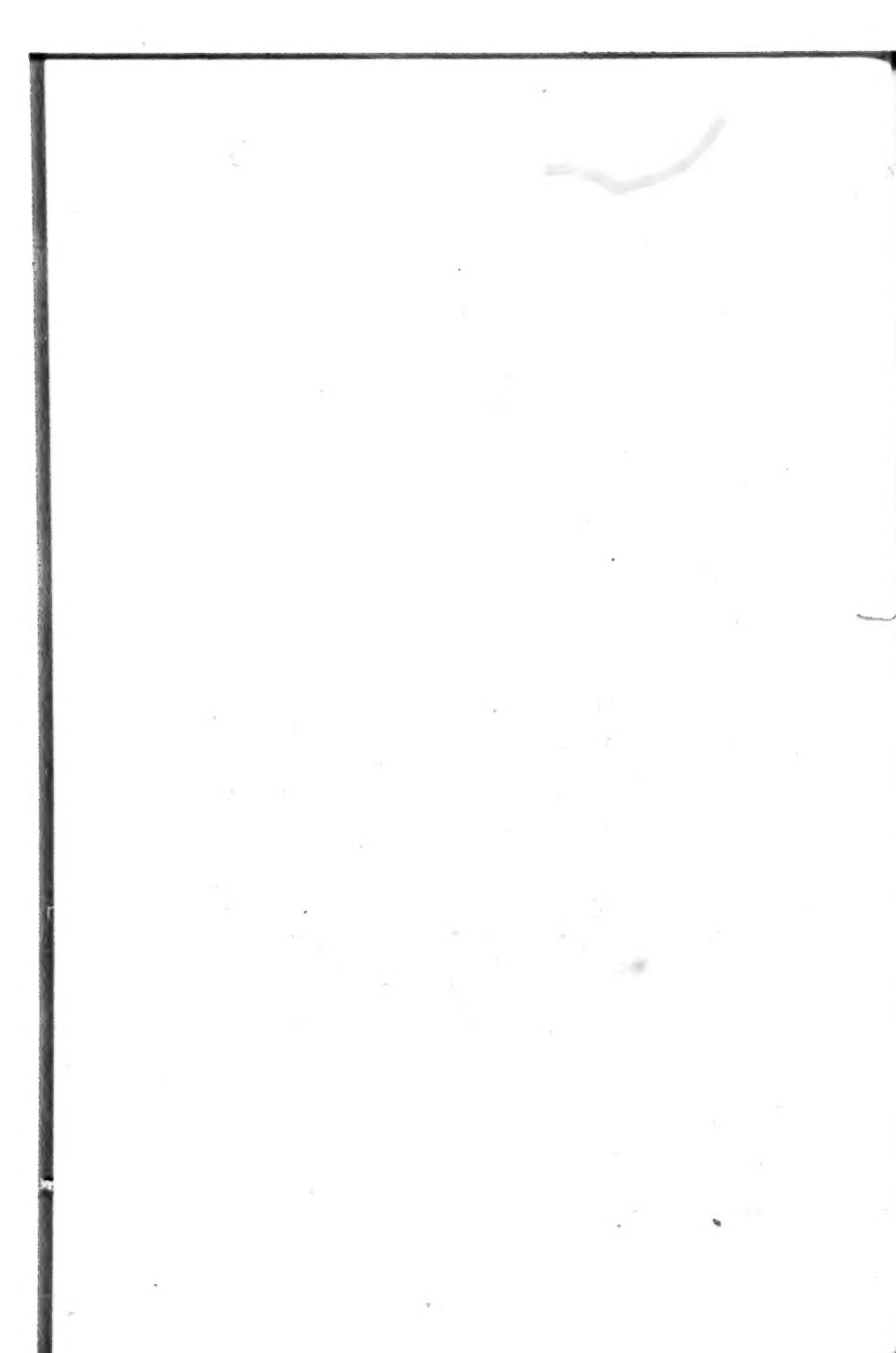
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APPENDIX

*Pertinent Excerpts from the Standards of the
National Advisory Commission on Criminal
Justice Standards and Goals
(Jan. 1973)*

**STANDARD 2.15
FREE EXPRESSION AND ASSOCIATION**

Each correctional agency should immediately develop policies and procedures to assure that individual offenders are able to exercise their constitutional right of free expression and association to the same extent and subject to the same limitations as the public-at-large. Regulations limiting an offender's right of expression and association should be justified by a compelling state interest requiring such limitation. Where such justification exists, the agency should adopt regulations which effectuate the state interest with as little interference with an offender's rights as possible.

* * * * *

Justification for limiting an offender's right of expression or association would include regulations necessary to maintain order, or to protect other offenders, correctional staff, or other persons from violence, or the clear threat of violence. The existence of a justification for limiting an offender's rights should be determined in light of all the circumstances including the nature of the correctional program or institution to which he is assigned.

Ordinarily, the following factors would not constitute sufficient justification for an interference with an offender's rights unless present in a situation which constituted a clear threat to personal or institutional security.

1. Protection of the correctional agency or its staff from criticism, whether or not justified.
2. Protection of other offenders from unpopular ideas.
3. Protection of offenders from views correctional officials deem not conducive to rehabilitation or other correctional treatment.
4. Administrative inconvenience.
5. Administrative cost except where unreasonable and disproportionate to that expended on other offenders for similar purposes.

Correctional authorities should encourage and facilitate the exercise of the right of expression and association by providing appropriate opportunities and facilities.

[Commentary omitted]

STANDARD 2.17 ACCESS TO THE PUBLIC

Each correctional agency should immediately develop and implement policies and procedures to fulfill the right of offenders to communicate with the public. Correctional regulations limiting such communication should be consistent with Standard 2.15. Questions of rights of access to the public arise primarily in the context of regulations affecting mail, personal visitation, and the communications media.

Mail. Offenders should have the right to communicate or correspond with persons or organizations and to send and receive letters, packages, books, periodicals, and any other material that can be lawfully mailed. The following additional guidelines should apply:

1. Correctional authorities should not limit the volume of mail to or from a person under supervision.
2. Correctional authorities should have the right to inspect incoming and outgoing mail, but *neither incoming*

nor outgoing mail should be read or censored. Cash, checks, or money orders should be removed from incoming mail and credited to offenders' accounts. If contraband is discovered in either incoming or outgoing mail, it may be removed. Only illegal items and items which threaten the security of the institution should be considered contraband.

3. Offenders should receive a reasonable postage allowance to maintain community ties. (emphasis added)

* * * * *

Commentary

* * * * *

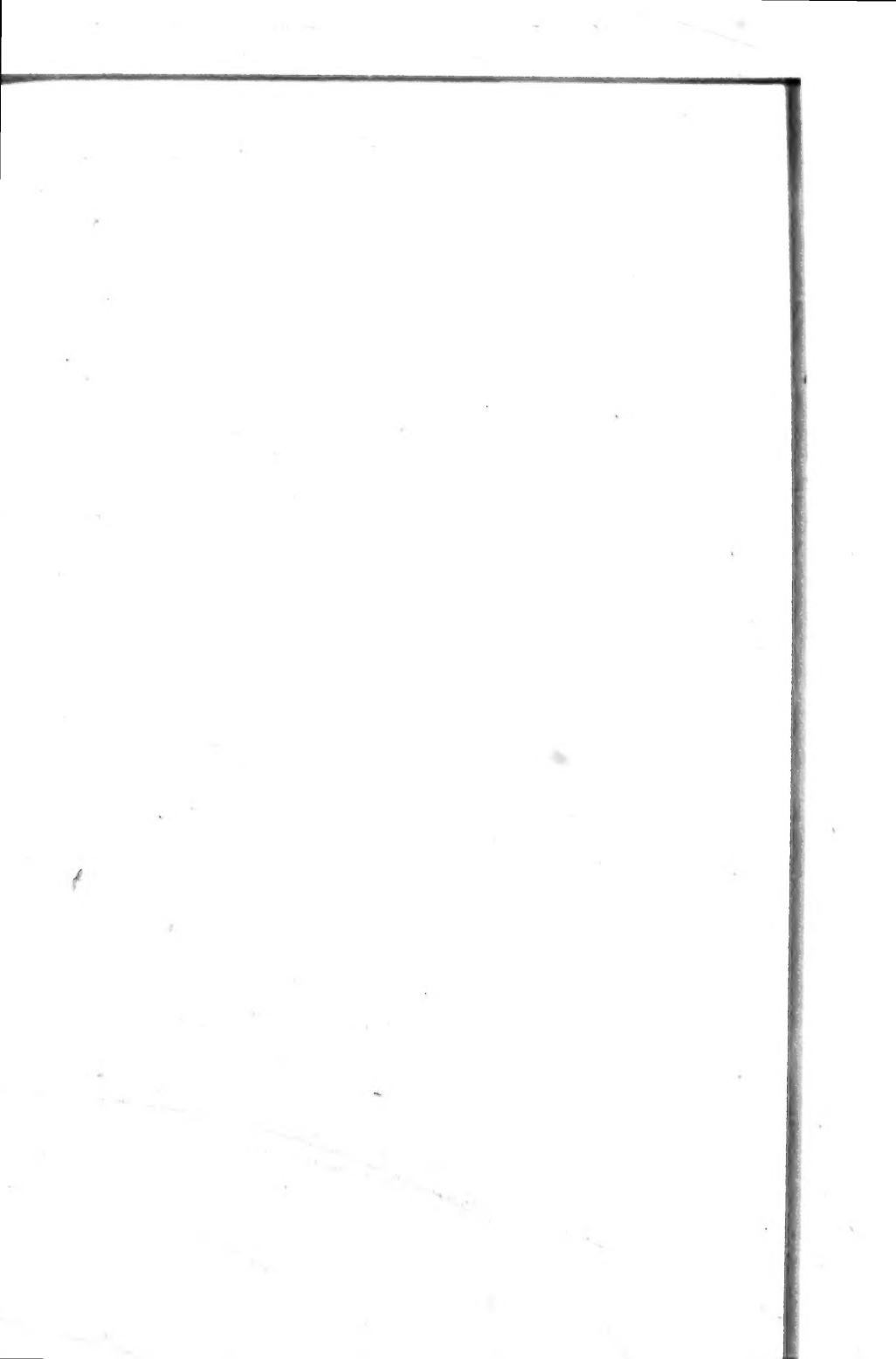
Mail. In censoring and regulating mail, correctional authorities have not limited themselves to keeping out harmful or potentially dangerous objects or substances. The censorship of mail all too often has been utilized to exclude ideas deemed by the censor to be threatening or harmful to offender or critical of the correctional agency. These efforts result in the diversion of manpower from other tasks and, to avoid excessive manpower drains, limitations on the volume of correspondence permitted. Censorship and limitations on correspondence directly generate inmate hostilities and serve to make correctional progress more difficult.

Courts began to look critically at this process when it came to their attention that correctional authorities were limiting access to courts. Instances of failure to mail complaints, invasion of privileged attorney-client communications, and reprisals against inmates for attempting to send out information about deficient conditions were documented. Limitations on access to religious material also were discovered and criticized.

Contraband must be excluded from correctional institutions to preserve their security and good order by

limiting the development of inmate power groups that often results from acquisition of contraband. The standard authorizes the correctional administrator to inspect incoming and outgoing mail for contraband but not to read or censor the contents.

Correctional authorities have a duty to insure that offenders are able to correspond with members of the public. A reasonable postage allowance should be provided each offender as part of an affirmative program to help him retain community ties.



NOV 7 1973

MICHAEL RUBAK, JR.

In the
Supreme Court of the United States

OCTOBER TERM, A.D. 1973

No. 72-1465

RAYMOND K. PROCUNIER,
DIRECTOR CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL.,
APPELLANTS,

v.

ROBERT MARTINEZ ET AL.,
APPELLEES.

BRIEF OF THE CENTER FOR CRIMINAL JUSTICE,
BOSTON UNIVERSITY SCHOOL OF LAW
AMICUS CURIAE

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**RAYMOND K. PROCUNIER,
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**BRIEF OF THE CENTER FOR CRIMINAL JUSTICE,
BOSTON UNIVERSITY SCHOOL OF LAW
AMICUS CURIAE**

Interest of Amicus Curiae *

The Center for Criminal Justice is a university-based study center which undertakes extensive research involving both legal scholarship and empirical investigation in selected areas of the criminal justice field. The Center has devoted a substantial amount of time to the two major substantive issues raised by this appeal.

* Letters of consent from counsel for appellants and counsel for appellees have been filed with the clerk of the Court.

In a comprehensive evaluation of the rights and responsibilities of prisoners, which resulted in the promulgation of Model Rules and Regulations † that have been adopted as the basis for recommended changes in the Department of Corrections of the Commonwealth of Massachusetts, the Center dealt with the issue of constraints on prisoners' mail. A separate study was also done concerning the need for law student involvement in prison legal services.††

In each of these areas, the Center's eventual proposals were based on the results of legal analysis and on a close involvement with prison authorities and the problems they encounter. The Center maintains an ongoing interest in this field and sets forth in this brief its views on the legal questions concerning the prison regulations at issue before the Court.

Argument

I.

THE DISTRICT COURT PROPERLY INVALIDATED THE CHALLENGED REGULATIONS UNDER THE COMPELLING STATE INTEREST TEST AND UNDER THE REASONABLE AND NECESSARY TEST, GIVEN CONTENT BY A LESS RESTRICTIVE ALTERNATIVE.

The right to use the mails¹ and the right of access to the

† Center for Criminal Justice, Boston University School of Law, *Model Rules and Regulations on Prisoners' Rights and Responsibilities* (West, 1973).

†† Center for Criminal Justice, Boston University School of Law, *Perspectives on Prison Legal Services: Needs, Impact, and the Potential for Law School Involvement* (U. S. Dept. of Commerce, National Technical Information Service, 1971). Copies of both documents have been lodged with the librarian for the Court.

¹ "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mail is almost as much a

courts² are fundamental personal freedoms jealously guarded by the courts. It is well established that such freedoms come before the Court occupying a "preferred position" and that regulations restricting these rights must bear a heavy burden of justification.

These two fundamental rights are not discarded at the prison gates.³ The fact of incarceration may add factors to be considered in the weighing process, but officials who wish to justify restrictions on such rights must continue to bear the same heavy burden.⁴ In striking down the mail regulations, the District Court measured the weight of this burden with two alternative standards: the "compelling state interest" test and the "reasonable and necessary" test. It was unnecessary for the Court to decide which

part of free speech as the right to use our tongues . . ." *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting), quoted in *Blount v. Rizzi*, 400 U.S. 410, 416 (1971).

² [A]bsent a countervailing state interest of overriding significance, persons forced to settle their claims of rights and duty through the judicial process must be given meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

³ *Nolan v. Fitzpatrick*, 451 F. 2d 545, 547 (1st Cir. 1971); *Levier v. Woodson*, 443 F. 2d 360 (10th Cir. 1971); *Brown v. Peyton*, 437 F. 2d 1228, 1230 (4th Cir. 1971); *Walker v. Blackwell*, 411 F. 2d 23, 24 (5th Cir. 1969); *Payne v. Whitmore*, 325 F. Supp. 1191, 1193 (N.D. Cal. 1971); *Fortune Society v. McGinnis*, 319 F. Supp. 901, 903 (S.D. N.Y. 1970) (freedom of expression). *Goodwin v. Oswald*, 462 F. 2d 1237, 1241 (2d Cir. 1972); *Coleman v. Peyton*, 362 F. 2d 905, 907 (4th Cir.) cert. denied, 385 U.S. 905 (1966); *Smith v. Robbins*, 328 F. Supp. 162, 164 (D. Me. 1971) aff'd 454 F. 2d 696 (1st Cir. 1972) (access to courts).

⁴ Because certain personal freedoms (such as the right of access to the courts and the right to communicate) are equally crucial to the inmate and because constitutional rights are often more vulnerable in a prison context, the fact of incarceration should heighten and not lessen judicial scrutiny.

formulation was appropriate because the regulations failed to comply with either test. *Martinez v. Procnier*, 354 F. Supp. 1092, 1096 (N.D. Cal. 1973). Further, the District Court found that, in reviewing restrictions on access to the courts, it must ascertain whether there existed "reasonable alternative means of limiting the undesirable conduct which do not entail so significant a restriction on access to the courts." 354 F. Supp. at 1098.

It is submitted that, in dealing with both these fundamental rights, the appropriate question to ask is whether a "compelling state interest" is served.⁵ At the least, as the District Court indicated, the regulations should fall if there is a less restrictive alternative regardless whether the "compelling state interest" test or the "reasonable and necessary" test is used. Consequently, employment of stringent standards are urged when restrictions on fundamental rights are being considered. Such an abundance of caution is necessary in the prison context where these rights are so open to invasion.

II.

RULE MV-IV-02 IMPERMISSIBLY IMPINGES UPON PRISONERS' CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS.

Standards

The Court has recognized that prisoners' constitutional right of access to the courts, *White v. Ragen*, 324 U.S. 760 (1945); *Ex parte Hull*, 312 U.S. 546 (1941), is hollow without the means to enable such access. *Johnson v. Avery*, 393 U.S. 483 (1969); *Younger v. Gilmore*, 414 U.S. 15

⁵ *Fortune Society v. McGinnis*, 319 F. Supp. 901, 904 (S.D. N.Y. 1970); *Palmigiano v. Travisono*, 317 F. Supp. 776, 785 (D. R.I. 1970) (right to use of the mails); *Goodwin v. Oswald*, 462 F. 2d 1237, 1244 (2d Cir. 1972) (access to the courts).

(1971). In *Cruz v. Hauck*, 475 F. 2d 475, 476 (5th Cir. 1973), Chief Judge John R. Brown underlined the importance of this right: "It is clear that ready access to the courts is one of, perhaps *the*, fundamental constitutional right." This right "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." *Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom. Younger v. Gilmore*, 414 U.S. 15 (1971). Furthermore, "... the constitutional protection . . . includes access to all courts, both state and federal without regard to the type of petition or relief sought." *Hooks v. Wainwright*, 352 F. Supp. 163, 167 (M.D. Fla. 1972).

In the present case, the issue is implementation of the fundamental constitutional right of prisoners' access to the courts. Inherent in its implementation is the right either to retain counsel or to receive the assistance of counsel if the circumstances so require. See *Younger v. Gilmore*, 414 U.S. 15 (1971); *Douglas v. California*, 372 U.S. 353 (1963); *Hooks v. Wainwright*, 352 F. Supp. 163 (M.D. Fla. 1972). Both aspects of this fundamental right invoke an affirmative duty on the state to provide inmates with effective means of access to the courts, *Hooks v. Wainwright*, 352 F. Supp. 163 (M.D. Fla. 1972), of which "a necessary concomitant to the right of access is the assistance of counsel." *Goodwin v. Oswald*, 462 F. 2d 1237, 1241 (2d Cir. 1972).

Assistance of counsel means effective assistance. *McMann v. Richardson*, 397 U.S. 759, 771 and n. 14 (1970); *Powell v. Alabama*, 287 U.S. 45, 71 (1932). To be effective, an attorney must know both the facts and the law involved in his case. *People v. Brown*, 102 Cal. Rptr. 518, 26 Cal. App. 3d 825 (1972); *People v. Gayton*, 88 Cal. Rptr. 891,

10 Cal. App. 3d 178 (1970). In order to do this, he needs to remain in contact with his client. *Coles v. Peyton*, 389 F. 2d 224 (4th Cir. 1968); see *ABA Standards Relating to the Defense Function* § 3.2, Commentary (Approved Draft 1971). As noted by the District Court below, investigation often is crucial for determination of the facts and requires client contact. 354 F. Supp. at 1097. Unless the facts are developed fully, legal analysis may prove fruitless. Any prison rule which limits counsel's ability to provide effective assistance through appropriate investigation and regular contact with the client seriously risks denying client prisoners their right of access to the courts.

The District Court determined as fact that, when attorneys are not allowed to send law students and para-professionals into prisons to interview inmates, the attorney's time available for legal evaluation is sacrificed in the interest of travel to interview inmates personally and, further, that under these circumstances, fewer prisoners can be served by attorneys. *Id.* at 1097-1098 (1973). When such facts exist, counsel's effectiveness and prisoners' fundamental right of access to the courts are eroded. When the ability of lawyers to provide assistance to prisoners at minimal cost is curtailed by prison rules like MV-IV-02,⁶ prisoners in need of legal counsel may have to rely on jailhouse lawyers, an alternative recognized at best as a necessary evil if no other form of legal assistance is available.⁷

⁶ Director's Mail and Visiting Manual, Section MV-IV-02 states:

Investigators for an attorney-of-record will be confined to not more than two. Such investigators must be licensed by the State or must be members of the State Bar. Designation must be made in writing by the attorney.

⁷ See *Johnson v. Avery*, 393 U.S. 483, 488 (1969); *U.S. v. Simpson*, 436 F. 2d 162, 166-167 (D.C. Cir. 1970); Center for Criminal Justice, Boston University School of Law, *Perspectives on Prison*

The District Court found that Rule MV-IV-02 was overbroad, 354 F. Supp. at 1099, and that the rule could not be justified merely by a perceived "threat to security" from a few attorney-designated investigators whom prison officials viewed as "people that we chose not to have in our institutions." *Id.* (Quoting Procunier Deposition 24-25). There is no indication that law students as a class or that paraprofessionals as a class are a security threat. By balancing considerations of prisoners' fundamental right of access to the courts against the questionable justifications for Rule MV-IV-02, it is clear that the rule is constitutionally insufficient under the reasonable and necessary test ("the *extent* of restriction against the *need* for restriction"), particularly as given content by a less restrictive alternative ("the existence of reasonable alternative means"). *Id.* at 1098. Rather than creating "a new constitutional right in the inmate," Brief for Appellant at 27, the District Court's ruling does no more than implement the principles of *Johnson v. Avery*, 393 U.S. 483 (1969), and *Younger v. Gilmore*, 414 U.S. 15 (1972), by removing an unconstitutional barrier to prisoner access to the courts.

Therefore, in attempting to reverse the holding of the District Court that Rule MV-IV-02 is unconstitutional, the State carries the heavy burden accompanying any denial of a fundamental right. Rule MV-IV-02 is one of those "... rules [that] touch upon interests of which the judiciary is more solicitous, and the burden of justifying these regulations is especially heavy, comparable to the 'overwhelm-

Legal Services: Needs, Impact, and the Potential for Law School Involvement xxiv (1971) [hereinafter cited as *Prison Legal Services*]: "prison legal services may be instrumental in . . . reducing the inmate's dependence on services which may only be available through representatives of the inmate power structure (e.g., the "jailhouse lawyer")"; Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 493 (1970).

ing state interest' required by *Shapiro v. Thompson*." *Gilmore v. Lynch*, 319 F. Supp. 105, 109 (N.D. Cal. 1970), *aff'd sub nom. Younger v. Gilmore*, 414 U.S. 15 (1971).

Implementation of Access

The resources of the bar, which include lay assistants as well as attorneys, already are strained at least in the provision of legal services to the poor, of which prisoners are one important category.⁸ Informed observers estimate that between 60 and 90 percent of prisoners are financially unable to retain counsel.⁹ When lawyers are denied the right to enlist in a responsible manner the assistance of non-attorneys, specifically law students and paraprofessionals, the amount of time a lawyer must spend on a case increases substantially; the number of cases he can handle decreases; and the quality of his preparation, particularly in the area of investigation, may be hampered by the need to conserve time and resources.¹⁰ The difficulties facing attorneys obviously work to the detriment of prisoners, both those the attorneys represent and those the attorneys would like to represent but cannot because their lay resources are immobilized by Rule MV-IV-02.

In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the manpower-cost dilemma involved in implementing the Sixth Amendment's right to the assistance of counsel led some members of the Court to speculate on the possible use of

⁸ See *Johnson v. Avery*, 353 U.S. 483, 491 (Douglas, J., concurring) (1969).

⁹ Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 495, 509-510, n. 105 and n. 107 (1970).

¹⁰ Cf. American Bar Association, *Code of Professional Responsibility*, Ethical Consideration 3-6 (1971).

nonlawyers as counsel.¹¹ Similar concerns face the Court today, although in a context of assistance to attorneys who wish to help prisoners gain access to the courts. As in *Argersinger*, "the heart of the problem [facing prisoners] . . . is the distribution and availability of lawyers,"¹² especially since most prisons are located in areas requiring substantial travel by attorneys. *Martinez v. Procunier*, 354 F. Supp. at 1098.

Law students offer an engaged and informed source of assistance to prisoners and to attorneys¹³ representing prisoners. While direct student access to prisons in the context of law school clinical programs¹⁴ is permitted by

¹¹ 407 U.S. 25, 40 (1972) (Brennan, Douglas, and Stewart, JJ., concurring). MR. JUSTICE BRENNAN noted that nationally there are 57 law school clinical programs in corrections. *But see id.* at 44 (Powell and Rehnquist, JJ., concurring in the result). MR. JUSTICE POWELL questioned whether the lay professionals suggested by the Solicitor General qualify as counsel.

¹² *Id.* at 58 (Powell and Rehnquist, JJ., concurring in the result).

¹³ American Bar Association, *Code of Professional Responsibility*, Canon 3, Ethical Consideration 3-3, n. 3 (1971):

A lawyer cannot delegate his professional responsibility to a law student employed in his office. He may avail himself of the assistance of the student in many of the fields of the lawyer's work, such as examination of case law, finding and interviewing witnesses, making collections of claims, examining court records, delivering papers, conveying important messages, and other similar matters. But the student is not permitted, until he is admitted to the Bar, to perform the professional functions of a lawyer such as conducting court trials, giving professional advice to clients or drawing legal documents for them *ABA Opinion* 85 (1932) (emphasis added).

¹⁴ *Martinez v. Procunier*, 354 F. Supp. 1092 (1973). Law school clinics in prisons labor under a number of serious constraints arising primarily from the conflict between educational purpose and service goals. *Prison Legal Services* at xxxii:

the California Department of Corrections, the very same class of persons (students) is barred from access when working for a private attorney rather than for a clinical program. In both situations, the good conduct of the students should be presumed from their implied interest in future admission to the Bar and from their knowledge of the Bar's clear interest in indicia of ethical sensibilities. Moreover, where a student is employed by a private attorney, the student's good conduct is ensured by the recognized agency relationship that exists between the two.¹⁵

Paraprofessionals as a class are also a significant and growing source of assistance to lawyers.¹⁶ Like law

In attempting to implement a student-staffed, onsite comprehensive service program of prison legal aid, various inherent limitations were exposed which may have general application to future law school efforts in this area. Caseload volume, law student inexperience and constraints on available time, continuity of student involvement and program operation, and the conflicting demands of education and service cast doubts on the ability of a law school to shoulder the full burden of such a project. Resulting operational limitations included: (1) the inability to conduct complete investigations wherever warranted (*e.g.*, verifying allegations of fact and reviewing trial records for error); (2) the inability to conduct extensive legal research as might be required in collateral attacks, appeals and test case litigation; (3) the inability to engage in trial work requiring heavy preparation; and, (4) the inability to process many cases which, of necessity, were likely to be long term in their duration.

¹⁵ American Bar Association, *Code of Professional Responsibility*, Canon 3, Ethical Consideration 3-3, n. 3 (1971):

The student in all his work must act as *agent* for the lawyer employing him, who must supervise his work and be responsible for his good conduct. (emphasis added).

¹⁶ See Avila, *Legal Paraprofessionals and Unauthorized Practice*, 8 Harv. Civ. R. — Civ. Lib. L. Rev. 104 (1973); Brickman, *Expansion of the Lawyering Process through a New Delivery System: The Emergence and State of Legal Paraprofessionals*, 71 Colum. L. Rev. 1153 (1971).

students, they may engage in a broad range of activities.¹⁷ Unlike most law students, however, a paraprofessional usually is a full-time employee. This relationship naturally involves careful scrutiny by the attorney and includes a recognized obligation of confidentiality.¹⁸ Scrutiny and confidentiality serve as restraints on misconduct similar to the law student's expectation of joining the Bar and the student-attorney agency relationship.

Although licensed investigators¹⁹ may be a source of lay assistance to attorneys providing counsel to prisoners, their availability for this purpose is questionable, both in terms of location and cost. There are approximately 2300 active investigator licenses in California.²⁰ Of those persons—individuals or group businesses—holding licenses, only some 900 licensees are actively engaged in investiga-

¹⁷ American Bar Association, *Code of Professional Responsibility*, Canon 3, Ethical Consideration 3-6, n. 3 (1971):

A lawyer may employ lay secretaries, *lay investigators*, lay detectives, lay researchers, accountants, lay scribes, non-lawyer draftsmen or nonlawyer researchers. In fact, he may employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings a part of the judicial process [sic], so long as it is he who takes the work and vouches for it to the client and becomes responsible to the client. *ABA Opinion* 316 (1967) (emphasis added).

¹⁸ *Id.* at Canon 4, Ethical Consideration 4-2.

¹⁹ Private Investigator and Adjustor Act; Cal. Business and Professions Code, Chapter 11; West's Ann. Bus. and Prof. Code § 7500-7590.

²⁰ Telephone conversation with Ronald Allen, 1915 Beverly Boulevard, Los Angeles, California 90057, (213) 483-2216, former President of the California Association of Licensed Investigators (until July 1973), Member of the Board of Directors of the California Association. September 11, 1973.

tion work.²¹ Between 25 and 30 percent of the 900 active licensees are located in the metropolitan Los Angeles area. Rates vary according to the skill and experience of the investigator. A common rate is around \$12.50 per hour, with a few top investigators²² receiving between \$20 and \$30 per hour.²³ While criminal investigation is one focus in the occupation, "the majority work in the civil and business field because they're the ones who can pay the tab."²⁴ Thus, restricting access to prisons only to members of the Bar and to licensed investigators effectively precludes attorneys who are representing prisoner clients from being able to rely on someone else to interview their clients. This result has the necessary effect of impermissibly restricting access to the courts.

Assistance from legal counsel in obtaining access to courts has been found to reduce frivolous claims,²⁵ to allow valid claims to be presented more effectively,²⁶ and to

²¹ *Id.* These figures do not include persons working as guards. The active licensees employ some 3000 assistants. The large number of active licenses not being used is due to the licensee's interest in maintaining the possibility of future activity and avoiding the annoyance of reviving a lapsed license.

²² *Id.* There are around 25 licensed investigators who can obtain top fees.

²³ *Id.* In addition to the hourly wage, an employer must pay for such necessary expenses as lodging, photo copying, supplies, and air travel. Automobile travel is additional and is computed at between 20 and 25 cents per mile.

²⁴ *Id.* Licensed investigators have no independent status to permit them entry into a prison.

²⁵ *Prison Legal Services* at I-7-8, II-55-61.

²⁶ Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 493, 521 (1970): "It is the view of the writers, based in part upon the experience of the Emory project, that if competent attorney assistance were provided to every indigent inmate desiring to file a post-conviction petition, the success rate would be at least

reduce inmate hostility toward judges, prosecutors, defense lawyers, and police.²⁷ Even when a prisoner does not prevail in a case, it often is of great psychological importance to him that he had effective access to the courts.²⁸

Since Rule MV-IV-02 improperly impinges upon the fundamental right of access to courts, its invalidation by the District Court should be sustained.

III.

CURRENT CORRECTIONAL TRENDS SHOW THAT APPELLANT'S MAIL REGULATIONS DO NOT REPRESENT THE LEAST RESTRICTIVE ALTERNATIVE NOR DO THEY PROMOTE A COMPELLING STATE INTEREST.

The District Court disapproved the prison mail regulations because they infringed upon the inmates' substantive and procedural First Amendment rights. In terms of substantive rights, the District Court found that the regulations in question were "vague and overbroad" and "permit[ted] censoring of lawful expressions without any apparent justification." 354 F. Supp. at 1096-1097. In addition, the challenged rules failed to meet First Amendment procedural requirements. 354 F. Supp. at 1097. Like substantive rules, inadequate procedures "chill" the right of free expression.²⁹ In order to assure the "necessary sensi-

ten per cent and, perhaps as high as fifteen per cent or more of petitions filed." Notice, for comparison, that sixteen per cent of direct criminal appeals in federal cases succeeded in 1960. *Id.* at n. 165.

²⁷ *Prison Legal Services* at xxiv-xxv, II-68-77, IV-58-60.

²⁸ *Id.* at xxix.

²⁹ Procedural guarantees "assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall*, 357 U.S. 513, 520 (1958). Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970).

tivity to freedom of expression,"³⁰ the District Court ordered that mail regulations should provide for notice of disapproval, reasonable opportunity to contest the decision, and review of the decision by an individual other than the one who originally disapproved. 354 F. Supp. at 1097.

Current Practices

A survey³¹ of mail regulations presently in use in other jurisdictions demonstrates the difficulty in justifying the mail regulations in question.

California inmates' mail was censored by prison officials whose discretion was ungoverned by effective standards. *See*, 354 F. Supp. at 1095. In contrast, regulations in several states severely restrict institutions' handling of incoming mail, outgoing mail, and official mail.³²

³⁰ *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

³¹ The following survey of regulations is based on data obtained in September, 1973, by the Center for Criminal Justice from corrections departments of twelve jurisdictions. They are Alaska, Connecticut, Kansas, Massachusetts, Minnesota, Ohio, Pennsylvania, Rhode Island, South Carolina, Washington, Wisconsin, and the federal government. (Of the twelve jurisdictions, two provided information too limited to present a clear indication of their current policies.) This selection was made on the basis of an extensive 1971 study by the Center of rules employed by the corrections departments of all the states. Those departments selected had recently changed their rules or were in the midst of change. No attempt was made to perform a comprehensive national survey. Nor will there be any attempt to present the total results of the September survey. The findings are offered simply to show that liberalized mail procedures are actually practiced and pose no threat to valid institutional objectives. All letters, regulations, and notes of interviews obtained from the responding departments are on file at the Center.

³² Regulations of corrections departments of other states also provide convincing evidence, substantive rights aside, that deprivation of procedural guarantees is not necessary to advancement of any

(a) Outgoing Mail

Massachusetts, Ohio, Rhode Island, and Washington all permit outgoing mail to be sent in sealed envelopes, immune from inspection of its physical contents and free of censorship of its verbal content.³³ South Carolina and Wisconsin neither censor nor inspect outgoing mail to addressees who

state ends. Five of the states surveyed require notice to the inmate of disapproval and return of mail. Telephone interview with Charles G. Adams, Director of the Alaska Division of Corrections, September 13, 1973 [hereinafter cited as *Adams Interview*]; Commissioner's Bulletin, 71-4, June 21, 1971 (Massachusetts); telephone interview with William K. Weisenberg, Administrative Assistant to the Director, September 14, 1973 [hereinafter cited as *Weisenberg Interview*] (Ohio); South Carolina Department of Corrections, *Inmate Guide* 19 (1972); Wisconsin Division of Corrections, *Manual of Adult Institution Procedures* 23 (1973) [hereinafter cited as *Wisconsin Manual*]. Washington goes so far as to notify the inmate of the removal of contraband from mail and of the opening of outgoing mail where probable cause to inspect has been found to exist. Administrative Order No. 838, 3, July 26, 1973. Alaska, Massachusetts, Ohio, and South Carolina provide the opportunity to contest a decision. *Adams Interview* (Alaska); telephone interview with Robert A. Bell, September 14, 1973 [hereinafter cited as *Bell Interview*] (Massachusetts); *Weisenberg Interview* (Ohio); *Inmate Guide* at 19 (South Carolina). Some states limit the sanctions available for violation of mail rules. While California inmates could be confined in segregation for improper correspondence, Pennsylvania and South Carolina guarantee correspondence "privileges" except in the event of "serious violations" (Administrative Directive, Resident Mail Privileges 3, September 1, 1972 [hereinafter as *Pennsylvania Directive*]) and when the inmate is "confined in punitive segregation" (*Inmate Guide* at 19). Alaska may impose no more than a return to censorship (*Adams Interview*).

³³ Commissioner's Bulletin 71-4, June 21, 1971 (Massachusetts); Department of Rehabilitation and Correction Administrative Regulations 814(a) [hereinafter cited as *Ohio Regulation*]; Regulation Governing Mail for Inmates at the Adult Correctional Institutions (Rhode Island); Administrative Order Number 838, 2-3, July 26, 1973 (Washington).

appear on an approved list of correspondents.³⁴ Alaska and Pennsylvania inspect outgoing mail but do not read it.³⁵ Kansas has discontinued "routine inspection" of outgoing mail except "where the security of the institution is believed to be involved."³⁶

(b) Incoming Mail

Alaska, Ohio, Pennsylvania, Rhode Island, South Carolina, Washington, and Wisconsin merely inspect incoming mail for contraband.³⁷

³⁴ The South Carolina Department of Corrections has three categories of correspondents. The "unrestricted" list includes attorneys, courts, state and federal officials, ministers, religious organizations and public service organizations. The "approved" list includes those who are judged not to represent a threat to security of the institution. Mail to these two types of correspondents is not opened. All other correspondents are on the "restricted" list. Mail sent to them is read and inspected. *Inmate Guide*, 17-18 (1972). A correspondent will be excluded from a Wisconsin inmate's "approved regular correspondence list" only if the correspondent would be a "reasonably probable hazard" to security or would be a "materially detrimental factor to rehabilitation." *Wisconsin Manual* at 22, 24.

³⁵ *Adams Interview* (Alaska); *Pennsylvania Directive* at 2. At this date, the Commissioner of Pennsylvania Corrections anticipates joining in a consent decree which will provide that all outgoing mail will be sealed, unread, and uninspected. Letter from Stewart Werner, Commissioner of the Bureau of Correction to the Center for Criminal Justice, September 6, 1973 [hereinafter cited as *Werner Letter*].

³⁶ Administrative Procedure No. 115, June 1, 1972. [The definition of "inspection" does not appear.]

³⁷ *Adams Interview* (Alaska); *Ohio Regulation* 814; *Pennsylvania Directive*; Regulations Governing Mail for All Inmates at the Adult Correctional Institutions (Rhode Island); *Inmate Guide* at 17-19 (South Carolina); Administrative Order Number 838 at 3 (Washington); *Wisconsin Manual* at 23. South Carolina and Wisconsin reserve the right to read mail from parties who do not appear on the approved lists. See, note 34, *supra*.

(c) Official Mail

All of the states discussed above have created a special category of mail which typically includes communications with attorneys, courts, state and federal officials, and in some cases, members of the news media. Such outgoing mail is permitted to be sent sealed, uninspected and uncensored. Massachusetts,³⁸ Ohio, Pennsylvania, Rhode Island, Washington, Wisconsin, and the Federal Bureau of Prisons open and inspect such mail only in the presence of the inmate addressee.³⁹

Effects of Current Practices

When the various departments surveyed undertook liberalization of their mail rules, they presumably made the judgment that such reforms would not constitute a serious threat to valid institutional concerns. None of the state corrections departments to which inquiries were directed, for example, claimed to experience any increase in escape attempts that might be attributable to relaxed mail policies. Alaska had no increase in attempts at all. *Adams Interview*. Officials from Ohio and Rhode Island stated that the rate of attempts has risen recently, but Rhode Island found no relationship between this and its mail procedures. Letter from Legal Counsel Edward Burke to the Center for

³⁸ This procedure is not provided by a written departmental regulation and in practice is available in only some of the Massachusetts institutions. *Bell Interview*.

³⁹ *Ohio Regulation 814; Pennsylvania Directive; Regulation Governing Mail for All Inmates at the Adult Correctional Institutions (Rhode Island); Administrative Order Number 838, 2, July 26, 1973 (Washington); telephone interview with John G. Stoddard, Assistant Director of Institutions, Wisconsin Department of Corrections, September 13, 1973 [hereinafter cited as Stoddard Interview]; Federal Bureau of Prison Policy Statement, Prisoners' Mail Box 1-2, August 7, 1972.*

Criminal Justice, September 13, 1973. Ohio attributed its rise in escape attempts primarily to liberalization of inmate movement both inside and outside the institution. Letter from William Weisenberg to the Center for Criminal Justice, September 10, 1973. Further, none of the states surveyed found that relaxed mail policies resulted in any increase in the incidence of contraband or in the rate of sexual assaults, individual violence, or general disturbances.

Instead of undermining institutional goals, compliance with First Amendment requirements has provided collateral benefits.⁴⁰ After liberalizing its mail rules, Washington state correctional authorities discovered a "general decrease in tension," and received letters "from residents and recipients indicating appreciation of the new censorship rule." Letter from Thomas G. Pinnoek, Supervisor of Planning, Social Services Division, to the Center for Criminal Justice, September 6, 1973. The Commissioner of Pennsylvania's Bureau of Corrections says that more liberal mail rules have given the resident "considerably more . . . self-respect and reduced discontent and bickering over petty censorship when in reality information censored could have been transmitted verbally on visits." Letter from Commissioner Stewart Werner, September 6, 1973.⁴¹

Recent Recommendations

Two recent extensive research studies provide further support for the types of liberalized mail regulations which

⁴⁰ Wisconsin's reform of mail procedures was principally a Division-initiated process motivated in part by a desire to increase administrative efficiency. *Stoddard Interview*.

⁴¹ A corrections official has suggested that opening up lines of communication between inmates and public may serve as a "catalytic agent in the reform of the criminal justice system." Letter from William K. Weisenberg, Administrative Assistant to

have just been described. In August, 1973, the National Advisory Commission on Criminal Justice Standards and Goals, in its report on a national strategy to reduce crime, recommended that "[c]orrectional authorities should have the right to inspect incoming and outgoing mail for contraband but not to read or censor mail." *A National Strategy to Reduce Crime* at 180.⁴²

This is consistent with an earlier study undertaken by the Boston University Center for Criminal Justice which recommended that: (1) all outgoing letters may be sealed and deposited in locked mailboxes; (2) incoming letters may be opened and inspected for contraband but shall not be read; and, (3) mail for attorneys, courts, and state and federal officials may be opened only in the presence of the inmate addressee. Center for Criminal Justice, *Model Rules and Regulations on Prisoners' Rights and Responsibilities*, 46-47 (1973).⁴³

The experience of numerous corrections departments and law enforcement officials offers ample support for the District Court finding that the challenged mail rules are vague and overbroad and fail to provide adequate procedural safeguards. It is also apparent that the rules fail to support a compelling state interest and without question do not offer a least restrictive means for regulating a fundamental right. Moreover, less restrictive mail policies are

the Director of the Ohio Department of Rehabilitation to the Boston University Center for Criminal Justice, September 14, 1973.

⁴² Members of the National Advisory Commission on Criminal Justice Standards and Goals were chosen, in part, for their working experience in the criminal justice area. Police chiefs, judges, corrections leaders, and prosecutors were represented.

⁴³ The Center's recommendations grew out of a thorough study in 1971 of practices employed by corrections departments throughout the United States.

not only feasible but are desirable for improving the correctional system. Thus, the judgment of the District Court should be affirmed or should be modified to preclude, except where required by compelling state interest, all reading of inmate mail.

Conclusion

For the reasons stated above, the judgment below should be sustained.

Respectfully submitted,

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OCTOBER TERM, 1972

No. 72-1465

RAYMOND K. PROCUNIER, Director,
California Department of Corrections, et al.,
Appellants,

VS.

ROBERT MARTINEZ, et al.,
Appellees.

On Appeal from the United States District Court
for the Northern District of California

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1972

No. 72-1465

RAYMOND K. PROCUNIER, Director,
California Department of Corrections, et al.,
Appellants,

VS.

ROBERT MARTINEZ, et al.,
Appellees.

On Appeal from the United States District Court
for the Northern District of California

APPELLANTS' REPLY BRIEF

This reply brief is submitted in order to correct
certain misapprehensions apparent in appellees' brief.

ARGUMENT

I

FEDERAL ABSTENTION IS REQUIRED

The appellee at once asserts that the abstention
argument was not presented to the district court but

that, even if it was, it was done in a "short and half-hearted" manner (Appellees' Br. at 15, n. 8).

This argument ignores the opinion of the three-judge court at 354 F.Supp. 1092, 1094-1095 (N.D. Cal. 1973) which considers the abstention argument at some length and rejects it and the dismissal by the district court of Count II of the original complaint because it had been rendered moot by the California Supreme Court decision in *In re Jordan*, 7 Cal.3d 930, 103 Cal.Rptr. 849 (1972), which interpreted California Penal Code section 2600.

Appellee then argues that California Penal Code section 2600 is not fairly subject to a construction which would modify or avoid the constitutional question. This section in pertinent part reads:

"Pursuant to the provisions of this section, prison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery. Nothing in this section shall be construed as limiting the right of prison authorities (i) to open and inspect any and all packages received by an inmate and (ii) to establish reasonable restrictions as to the number of newspapers, magazines, and books that the inmate may have in his cell or elsewhere in the prison at one time." (Emphasis added.)

We submit that a California court could indeed fairly interpret this statute so as to give the cor-

rectional authorities power to censor mail only to exclude "obscene publications or writings" or material "tending to incite murder, arson, riot, violent racism, or any other form of violence" and "gambling or a lottery." If so, this would render the present argument concerning Director's Rule D 1201 forbidding "magnifying grievances" and "unduly complaining" totally moot because that regulation as applied to mail would be statutorily unauthorized.

Appellee further complains that there is no comparable state remedy because the great writ of habeas corpus is used to attack prison conditions in California. See *In re Harrell*, 2 Cal.3d 675, 87 Cal.Rptr. 504 (1970), and *In re Jordan*, 7 Cal.3d 930, 103 Cal. Rptr. 849 (1972). This seems to be contradictory to appellees' position at page 18 where, by their own admission, they advised the district court to abstain presumably because there ~~was~~ a comparable state remedy. Moreover, the remedy of habeas corpus, combined with that of mandate, has a far wider application in California than appellees are apparently aware. See *Reaves v. Superior Court*, 22 Cal.App.3d 587, 99 Cal.Rptr. 156 (1971).

Finally, appellees argue it is too late to order abstention; in effect the harm has been done and without complaint from appellants. This is not so. Appellants did apply unsuccessfully for a stay from all levels of the federal courts, but the friction continues as long as the federal district court maintains close and direct supervision of the state correctional system.

II

**THE MAIL REGULATIONS ARE NOT OF
FEDERAL CONSTITUTIONAL DIMENSION**

The basic difference between appellants and appellees is in their respective approaches to the inmate's ability to send social mail. The district court held that a restriction on the ability to send social mail must be justified by either a "compelling interest" or a "reasonable and necessary" state interest. Absent such justification, any restriction on social mail must fail and the proponents of the regulation have the burden of sustaining its validity.¹

The appellants urge this Court to hold that there is no federal constitutional right in state prison inmates to send social mail. If this is so, there should be no burden on the states to prove justification of their regulations controlling such social mail to federal courts. If there is support for the concept of restriction in any rational system, that is sufficient.²

¹The district court's "Order Re Proposed New Regulations", filed on May 30, 1973, noted that:

"The Court believes that in light of the present text of Rule 2401, to wit, 'the sending and receiving of mail is a privilege, not a right . . . ' defendants should adopt a statement summarizing the Court's holding in this case in lieu of Rule 2401. The Court suggests the following:

'Sending and receiving letters is not to be interfered with except that a specific letter may be disapproved if its contents are in violation of the following rules.' " (App. at p. 160)

²It may well be that there is great debate on the rehabilitational propriety of the censorship of inmate social mail but this is irrelevant to any federal constitutional question. Accepting as true appellees' statement, ". . . it is as likely that mail censorship impedes rehabilitation as that it furthers it" Appellees' Brief p. 42, it follows that there is no federal constitutional question at issue.

Of course, concepts of equal protection, cruel and unusual punishment, free exercise of religion, and other specific provisions of the constitution, will all continue to protect the inmate but these do not empower the federal court to declare the limits and purposes of censorship of social mail.³ The right to send social mail is a "free man's" right and is lost upon a valid felony conviction and sentence of imprisonment. California provides confidential and unrestricted access to courts, legislators, executive officials and to attorneys. Social mail is a matter of prison administration, not federal constitutional right. *Frye v. Henderson*, 474 F.2d 1263 (5th Cir. 1973).

III

THE PARAPROFESSIONAL AND LAW STUDENT REGULATIONS

The appellees claim that new regulations concerning paraprofessional and law school students were voluntarily submitted. (Appellees' Br. at 45.) In this they are mistaken. These actions were taken under orders from the district court and, as has been shown above, stays were sought, albeit unsuccessfully, at all available levels of the federal court system.

The original opinion of the district court delineated the class of persons entitled to confidential interviews with inmates as "bona fide law students under the

³Compare *United States v. Wilson*, 447 F.2d 1, 8 (9th Cir. 1973) (72-3145), coming to diametrically opposed conclusions regarding the "lawful possession" of inmate mail.

supervision of attorneys or full time lay employees of attorneys," 354 F.Supp. at 1099. After further hearings and objection, this was amended to:

"(3) Law students certified under the State Bar Rules for Practical Training of Law Students and sponsored by the attorney of record or

(4) . . . persons regularly employed by the attorney of record to do legal or quasi-legal research on a full-time basis." (App. at p. 166).

In the final order after yet further argument, this became:

"(3) Law students certified under the State Bar Rules for Practical Training of Law Students and sponsored by the Attorney of Record, or

(4) legal paraprofessionals certified by the State Bar or other equivalent body and sponsored by the attorney of record." (Supp. to App. pp. 198-199).

The appellants strongly urge that the broad language contained in the published opinion be disapproved. It is the opinion which has precedential value. It is the opinion's language which will be quoted and relied upon.

It is submitted that this Court is the proper body to establish minimum constitutional standards of access to the Courts. It may then require its lower courts to examine whether these minimums have been met in particular cases but once established that they have, and that the state under federal scrutiny is in compliance, we respectfully submit that the federal inquiry should end.

Whether paraprofessionals eventually will contribute materially to the legal representation of all persons including the indigent and inmates is yet an open question. We urge that it is premature for any federal court to hold that the federal constitution requires that this as yet undelineated class be given confidential access to state prison inmates.

IV

THE PROCEDURAL DUE PROCESS REQUIREMENTS

There appears to be much confusion among appellants (App. at 6) regarding the appellate procedures available to inmates. As the appellees properly comment, under the mandate of the federal courts, inmate discipline procedures have been the subject of extensive litigation. See *Clutchette v. Procunier*, 328 F.Supp. 767 (N.D. Cal. 1971), and subsequent proceedings in the Ninth Circuit Court of Appeals. Different procedures are provided for in the case of other grievances including those involving social mail. These were and are contained in Director's Rule DP 1003 (Supp. to App. at 198). At that time, this rule provided:

"RIGHT TO ADMINISTRATIVE REVIEW OF GRIEVANCES. Each inmate has the right to appeal decisions or conditions affecting his or her welfare. Each institution head must provide a system whereby an inmate may request and receive administrative review of any problem or complaint. Such review will involve upper level staff and will insure that the complaint receives timely, courteous and con-

siderate attention. The institutional appeal procedure will apply to all areas of complaint except the disciplinary process and the Adult Authority hearing process, each of which has a special appeal or review procedure."

The appellant urges this Court to hold that the precision and detail of procedural due process requirements, particularly fair-warning, which underlies concepts such as vagueness, be varied according to the nature of the state action taken. Thus all social mail may be read. If lawfully read, it may be lawfully used. It is sufficient if the appellee is notified if any mail thought to be indicative of his rehabilitary progress be placed in his file. Social mail we submit can be rejected if it magnifies grievances or unduly criticizes. It may be that social mail can also form the basis for disciplinary action but when this happens, the protections of *Clutchette v. Procunier* come into operation and the tests applied are more rigorous than those used gauging or guiding rehabilitary process.

In short, the appellants urge that this Court hold that the detailed and meticulous safeguards held appropriate in the defense of "core rights" be not required in every dispute arising between a prison inmate and the state correctional authority.

CONCLUSION

We submit that the district court should have abstained, that the social mail regulation does not present a substantial federal question and that the rules relating to paraprofessionals do not demonstrate any federal constitutional deprivation.

Dated, November 26, 1973.

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PROCUNIER, CORRECTIONS DIRECTOR, ET AL. v.
MARTINEZ ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. 72-1465. Argued December 3, 1973—Decided April 29, 1974

Appellees, prison inmates, brought this class action challenging prisoner mail censorship regulations issued by the Director of the California Department of Corrections and the ban against the use of law students and legal paraprofessionals to conduct attorney-client interviews with inmates. The mail censorship regulations, *inter alia*, proscribed inmate correspondence that "unduly complain[ed]," "magnif[ied] grievances," "express[ed] inflammatory political, racial, religious or other views or beliefs," or contained matter deemed "defamatory" or "otherwise inappropriate." The District Court held these regulations unconstitutional under the First Amendment, void for vagueness, and violative of the Fourteenth Amendment's guarantee of procedural due process, and it enjoined their continued enforcement. The court required that an inmate be notified of the rejection of correspondence and that the author of the correspondence be allowed to protest the decision and secure review by a prison official other than the original censor. The District Court also held that the ban against the use of law students and legal paraprofessionals to conduct attorney-client interviews with inmates abridged the right of access to the courts and enjoined its continued enforcement. Appellants contend that the District Court should have abstained from deciding the constitutionality of the mail censorship regulations. *Held*:

1. The District Court did not err in refusing to abstain from deciding the constitutionality of the mail censorship regulations. Pp. 400-404.

2. The censorship of direct personal correspondence involves incidental restrictions on the right to free speech of both prisoners and their correspondents and is justified if the following criteria are met: (1) it must further one or more of the important and substantial governmental interests of security, order, and the rehabilitation of inmates, and (2) it must be no greater than is necessary to further the legitimate governmental interest involved. Pp. 404-414.

3. Under this standard the invalidation of the mail censorship regulations by the District Court was correct. Pp. 415-416.

4. The decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards against arbitrariness or error, and the requirements specified by the District Court were not unduly burdensome. Pp. 417-419.

5. The ban against attorney-client interviews conducted by law students or legal paraprofessionals, which was not limited to prospective interviewers who posed some colorable threat to security or to those inmates thought to be especially dangerous and which created an arbitrary distinction between law students employed by attorneys and those associated with law school programs (against whom the ban did not operate), constituted an unjustifiable restriction on the inmates' right of access to the courts. *Johnson v. Avery*, 393 U. S. 483. Pp. 419-422.

354 F. Supp. 1092, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed a concurring opinion, in which BRENNAN, J., joined and in Part II of which DOUGLAS, J., joined, *post*, p. 422. DOUGLAS, J., filed an opinion concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 428.

W. Eric Collins, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *Evelle J. Younger*, Attorney General, *Edward A. Hinz, Jr.*, Chief Assistant Attorney General, *Doris H. Maier*, Assistant Attorney General, and *Robert R. Granucci* and *Thomas A. Brady*, Deputy Attorneys General.

William Bennett Turner argued the cause for appellees. With him on the brief were *Mario Obledo*, *Sanford Jay Rosen*, *Anthony G. Amsterdam*, *Jack Greenberg*, *James M. Nabrit III*, *Stanley A. Bass*, *Lowell Johnston*, and *Alice Daniel*.*

*Briefs of *amici curiae* urging affirmance were filed by *William R. Fry* for the National Paralegal Institute, and by *Sheldon Krantz* and

MR. JUSTICE POWELL delivered the opinion of the Court.

This case concerns the constitutionality of certain regulations promulgated by appellant Procunier in his capacity as Director of the California Department of Corrections. Appellees brought a class action on behalf of themselves and all other inmates of penal institutions under the Department's jurisdiction to challenge the rules relating to censorship of prisoner mail and the ban against the use of law students and legal paraprofessionals to conduct attorney-client interviews with inmates. Pursuant to 28 U. S. C. § 2281 a three-judge United States District Court was convened to hear appellees' request for declaratory and injunctive relief. That court entered summary judgment enjoining continued enforcement of the rules in question and ordering appellants to submit new regulations for the court's approval. 354 F. Supp. 1092 (ND Cal. 1973). Appellants' first revisions resulted in counterproposals by appellees and a court order issued May 30, 1973, requiring further modification of the proposed rules. The second set of revised regulations was approved by the District Court on July 20, 1973, over appellees' objections. While the first proposed revisions of the Department's regulations were pending before the District Court, appellants brought this appeal to contest that court's decision holding the original regulations unconstitutional.

We noted probable jurisdiction. 412 U. S. 948 (1973). We affirm.

I

First we consider the constitutionality of the Director's Rules restricting the personal correspondence of prison inmates. Under these regulations, correspondence be-

Stephen Joel Trachtenberg for the Center for Criminal Justice, Boston University School of Law.

tween inmates of California penal institutions and persons other than licensed attorneys and holders of public office was censored for nonconformity to certain standards. Rule 2401 stated the Department's general premise that personal correspondence by prisoners is "a privilege, not a right" ¹ More detailed regulations implemented the Department's policy. Rule 1201 directed inmates not to write letters in which they "unduly complain" or "magnify grievances." ² Rule 1205 (d) defined as contraband writings "expressing inflammatory political, racial, religious or other views or beliefs" ³ Finally, Rule 2402 (8) provided that inmates "may not send or receive letters that pertain to criminal activity;

¹ Director's Rule 2401 provided:

"The sending and receiving of mail is a privilege, not a right, and any violation of the rules governing mail privileges either by you or by your correspondents may cause suspension of the mail privileges."

² Director's Rule 1201 provided:

"INMATE BEHAVIOR: Always conduct yourself in an orderly manner. Do not fight or take part in horseplay or physical encounters except as part of the regular athletic program. Do not agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence."

It is undisputed that the phrases "unduly complain" and "magnify grievances" were applied to personal correspondence.

³ Director's Rule 1205 provided:

"The following is contraband:

"d. Any writings or voice recordings expressing inflammatory political, racial, religious or other views or beliefs when not in the immediate possession of the originator, or when the originator's possession is used to subvert prison discipline by display or circulation."

Rule 1205 also provides that writings "not defined as contraband under this rule, but which, if circulated among other inmates, would in the judgment of the warden or superintendent tend to subvert prison order or discipline, may be placed in the inmate's property, to which he shall have access under supervision."

are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate."⁴

Prison employees screened both incoming and outgoing personal mail for violations of these regulations. No further criteria were provided to help members of the mailroom staff decide whether a particular letter contravened any prison rule or policy. When a prison employee found a letter objectionable, he could take one or more of the following actions: (1) refuse to mail or deliver the letter and return it to the author; (2) submit a disciplinary report, which could lead to suspension of mail privileges or other sanctions; or (3) place a copy of the letter or a summary of its contents in the prisoner's file, where it might be a factor in determining the inmate's work and housing assignments and in setting a date for parole eligibility.

The District Court held that the regulations relating to prisoner mail authorized censorship of protected expression without adequate justification in violation of the First Amendment and that they were void for vagueness. The court also noted that the regulations failed to provide minimum procedural safeguards against error and arbitrariness in the censorship of inmate correspondence. Consequently, it enjoined their continued enforcement.

Appellants contended that the District Court should have abstained from deciding these questions. In that court appellants advanced no reason for abstention other than the assertion that the federal court should defer to the California courts on the basis of comity. The District Court properly rejected this suggestion, noting that the

⁴At the time of appellees' amended complaint, Rule 2402 (8) included prohibitions against "prison gossip or discussion of other inmates." Before the first opinion of the District Court, these provisions were deleted, and the phrase "contain foreign matter" was substituted in their stead.

mere possibility that a state court might declare the prison regulations unconstitutional is no ground for abstention. *Wisconsin v. Constantineau*, 400 U. S. 433, 439 (1971).

Appellants now contend that we should vacate the judgment and remand the case to the District Court with instructions to abstain on the basis of two arguments not presented to it. First, they contend that any vagueness challenge to an uninterpreted state statute or regulation is a proper case for abstention. According to appellants, "[t]he very statement by the district court that the regulations are vague constitutes a compelling reason for abstention." Brief for Appellants 8-9. As this Court made plain in *Baggett v. Bullitt*, 377 U. S. 360 (1964), however, not every vagueness challenge to an uninterpreted state statute or regulation constitutes a proper case for abstention.⁵ But we need not decide whether appellants' contention is controlled by the analysis in *Baggett*, for the short

⁵ In *Baggett* the Court considered the constitutionality of loyalty oaths required of certain state employees as a condition of employment. For the purpose of applying the doctrine of abstention the Court distinguished between two kinds of vagueness attacks. Where the case turns on the applicability of a state statute or regulation to a particular person or a defined course of conduct, resolution of the unsettled question of state law may eliminate any need for constitutional adjudication. 377 U. S., at 376-377. Abstention is therefore appropriate. Where, however, as in this case, the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague terms, abstention is not required. *Id.*, at 378. In such a case no single adjudication by a state court could eliminate the constitutional difficulty. Rather it would require "extensive adjudications, under the impact of a variety of factual situations," to bring the challenged statute or regulation "within the bounds of permissible constitutional certainty." *Ibid.*

answer to their argument is that these regulations were neither challenged nor invalidated solely on the ground of vagueness. Appellees also asserted, and the District Court found, that the rules relating to prisoner mail permitted censorship of constitutionally protected expression without adequate justification. In light of the successful First Amendment attack on these regulations, the District Court's conclusion that they were also unconstitutionally vague hardly "constitutes a compelling reason for abstention."

As a second ground for abstention appellants rely on Cal. Penal Code § 2600 (4), which assures prisoners the right to receive books, magazines, and periodicals.⁶ Although they did not advance this argument to the District Court, appellants now contend that the interpretation of the statute by the state courts and its application to the regulations governing prisoner mail might avoid or modify the constitutional questions decided below. Thus appellants seek to establish the essential prerequisite for abstention—"an uncertain issue of state

⁶ Cal. Penal Code § 2600 provides that "[a] sentence of imprisonment in a state prison for any term suspends all the civil rights of the person so sentenced . . .," and it allows for partial restoration of those rights by the California Adult Authority. The statute then declares, in pertinent part:

"This section shall be construed so as not to deprive such person of the following civil rights, in accordance with the laws of this state:

"(4) To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office. Pursuant to the provisions of this section, prison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery. . . ."

law," the resolution of which may eliminate or materially alter the federal constitutional question.⁷ *Harman v. Forssenius*, 380 U. S. 528, 534 (1965). We are not persuaded.

A state court interpretation of § 2600 (4) would not avoid or substantially modify the constitutional question presented here. That statute does not contain any provision purporting to regulate censorship of personal correspondence. It only preserves the right of inmates to receive "newspapers, periodicals, and books" and authorizes prison officials to exclude "obscene publications or writings, and mail containing information concerning

⁷ Appellants argue that the correctness of their abstention argument is demonstrated by the District Court's disposition of Count II of appellees' amended complaint. In Count II appellees challenged the mail regulations on the ground that their application to correspondence between inmates and attorneys contravened the Sixth and Fourteenth Amendments. Appellees later discovered that a case was then pending before the Supreme Court of California in which the application of the prison rules to attorney-client mail was being attacked under subsection (2) of § 2600, which provides:

"This section shall be construed so as not to deprive [an inmate] of the following civil rights, in accordance with the laws of this state:

"(2) To correspond, confidentially, with any member of the State Bar, or holder of public office, provided that the prison authorities may open and inspect such mail to search for contraband."

The District Court did stay its hand, and the subsequent decision in *In re Jordan*, 7 Cal. 3d 930, 500 P. 2d 873 (1972) (holding that § 2600 (2) barred censorship of attorney-client correspondence), rendered Count II moot. This disposition of the claim relating to attorney-client mail is, however, quite irrelevant to appellants' contention that the District Court should have abstained from deciding whether the mail regulations are constitutional as they apply to personal mail. Subsection (2) of § 2600 speaks directly to the issue of censorship of attorney-client mail but says nothing at all about personal correspondence, and appellants have not informed us of any challenge to the censorship of personal mail presently pending in the state courts.

where, how, or from whom *such matter* may be obtained . . ." (emphasis added). And the plain meaning of the language is reinforced by recent legislative history. In 1972, a bill was introduced in the California Legislature to restrict censorship of personal correspondence by adding an entirely new subsection to § 2600. The legislature passed the bill, but it was vetoed by Governor Reagan. In light of this history, we think it plain that no reasonable interpretation of § 2600 (4) would avoid or modify the federal constitutional question decided below. Moreover, we are mindful of the high cost of abstention when the federal constitutional challenge concerns facial repugnance to the First Amendment. *Zwickler v. Koota*, 389 U. S. 241, 252 (1967); *Baggett v. Bullitt*, 377 U. S., at 379. We therefore proceed to the merits.

A

Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions.* More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons

* See Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 Va. L. Rev. 841, 842-844 (1971).

in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.⁹ Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect consti-

⁹ They are also ill suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints. Moreover, the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous prisoner complaints. As one means of alleviating this problem, THE CHIEF JUSTICE has suggested that federal and state authorities explore the possibility of instituting internal administrative procedures for disposition of inmate grievances. 59 A. B. A. J. 1125, 1128 (1973). At the Third Circuit Judicial Conference meeting of October 15, 1973, at which the problem was addressed, suggestions also included (i) abstention where appropriate to avoid needless consideration of federal constitutional issues; and (ii) the use of federal magistrates who could be sent into penal institutions to conduct hearings and make findings of fact. We emphasize that we express no view as to the merit or validity of any particular proposal, but we do think it appropriate to indicate the necessity of prompt and thoughtful consideration by responsible federal and state authorities of this worsening situation.

tutional rights. *Johnson v. Avery*, 393 U. S. 483, 486 (1969). This is such a case. Although the District Court found the regulations relating to prisoner mail deficient in several respects, the first and principal basis for its decision was the constitutional command of the First Amendment, as applied to the States by the Fourteenth Amendment.¹⁰

The issue before us is the appropriate standard of review for prison regulations restricting freedom of speech. This Court has not previously addressed this question, and the tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights has led the federal courts to adopt a variety of widely inconsistent approaches to the problem. Some have maintained a hands-off posture in the face of constitutional challenges to censorship of prisoner mail. *E. g.*, *McCloskey v. Maryland*, 337 F. 2d 72 (CA4 1964); *Lee v. Tahash*, 352 F. 2d 970 (CA8 1965) (except insofar as mail censorship rules are applied to discriminate against a particular racial or religious group); *Krupnick v. Crouse*, 366 F. 2d 851 (CA10 1966); *Pope v. Daggett*, 350 F. 2d 296 (CA10 1965). Another has required only that censorship of personal correspondence not lack support "in any rational and constitutionally acceptable concept of a prison system." *Sostre v. McGinnis*, 442 F. 2d 178, 199 (CA2 1971), cert. denied, *sub nom. Oswald v. Sostre*, 405 U. S. 978 (1972). At the other extreme some courts have been willing to require demonstration of a "compelling state interest" to justify censorship of prisoner mail. *E. g.*, *Jackson v. Godwin*, 400 F. 2d 529

¹⁰ Specifically, the District Court held that the regulations authorized restraint of lawful expression in violation of the First and Fourteenth Amendments, that they were fatally vague, and that they failed to provide minimum procedural safeguards against arbitrary or erroneous censorship of protected speech.

(CA5 1968) (decided on both equal protection and First Amendment grounds); *Morales v. Schmidt*, 340 F. Supp. 544 (WD Wis. 1972); *Fortune Society v. McGinnis*, 319 F. Supp. 901 (SDNY 1970). Other courts phrase the standard in similarly demanding terms of "clear and present danger." *Wilkinson v. Skinner*, 462 F. 2d 670, 672-673 (CA2 1972). And there are various intermediate positions, most notably the view that a "regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably and necessarily to the advancement of some justifiable purpose." *Carothers v. Follette*, 314 F. Supp. 1014, 1024 (SDNY 1970) (citations omitted). See also *Gates v. Collier*, 349 F. Supp. 881, 896 (ND Miss. 1972); *LeMon v. Zelker*, 358 F. Supp. 554 (SDNY 1972).

This array of disparate approaches and the absence of any generally accepted standard for testing the constitutionality of prisoner mail censorship regulations disserve both the competing interests at stake. On the one hand, the First Amendment interests implicated by censorship of inmate correspondence are given only haphazard and inconsistent protection. On the other, the uncertainty of the constitutional standard makes it impossible for correctional officials to anticipate what is required of them and invites repetitive, piecemeal litigation on behalf of inmates. The result has been unnecessarily to perpetuate the involvement of the federal courts in affairs of prison administration. Our task is to formulate a standard of review for prisoner mail censorship that will be responsive to these concerns.

B

We begin our analysis of the proper standard of review for constitutional challenges to censorship of prisoner mail with a somewhat different premise from that taken

by the other federal courts that have considered the question. For the most part, these courts have dealt with challenges to censorship of prisoner mail as involving broad questions of "prisoners' rights." This case is no exception. The District Court stated the issue in general terms as "the applicability of First Amendment rights to prison inmates . . .," 354 F. Supp., at 1096, and the arguments of the parties reflect the assumption that the resolution of this case requires an assessment of the extent to which prisoners may claim First Amendment freedoms. In our view this inquiry is unnecessary. In determining the proper standard of review for prison restrictions on inmate correspondence, we have no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand. In the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them,¹¹ mail censorship implicates more than the right of prisoners.

Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal corre-

¹¹ Different considerations may come into play in the case of mass mailings. No such issue is raised on these facts, and we intimate no view as to its proper resolution.

spondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication. *Lamont v. Postmaster General*, 381 U. S. 301 (1965). Accord *Kleindienst v. Mandel*, 408 U. S. 753, 762-765 (1972); *Martin v. City of Struthers*, 319 U. S. 141, 143 (1943). We do not deal here with difficult questions of the so-called "right to hear" and third-party standing but with a particular means of communication in which the interests of both parties are inextricably meshed. The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him. In either event, censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners.

Accordingly, we reject any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners. Into this category of argument falls appellants' contention that "an inmate's rights with reference to social correspondence are something fundamentally different than those enjoyed by his free brother." Brief for Appellants 19. This line of argument and the undemanding standard of review it is intended to support fail to recognize that the First Amendment liberties of free citizens are implicated in censorship of prisoner mail. We therefore turn for guidance, not to cases involving questions of "prisoners' rights," but to decisions of this Court dealing with the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities.

As the Court noted in *Tinker v. Des Moines School District*, 393 U. S. 503, 506 (1969), First Amendment

guarantees must be "applied in light of the special characteristics of the . . . environment." *Tinker* concerned the interplay between the right to freedom of speech of public high school students and "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.*, at 507. In overruling a school regulation prohibiting the wearing of antiwar armbands, the Court undertook a careful analysis of the legitimate requirements of orderly school administration in order to ensure that the students were afforded maximum freedom of speech consistent with those requirements. The same approach was followed in *Healy v. James*, 408 U. S. 169 (1972), where the Court considered the refusal of a state college to grant official recognition to a group of students who wished to organize a local chapter of the Students for a Democratic Society (SDS), a national student organization noted for political activism and campus disruption. The Court found that neither the identification of the local student group with the national SDS, nor the purportedly dangerous political philosophy of the local group, nor the college administration's fear of future, unspecified disruptive activities by the students could justify the incursion on the right of free association. The Court also found, however, that this right could be limited if necessary to prevent campus disruption, *id.*, at 189-190, n. 20, and remanded the case for determination of whether the students had in fact refused to accept reasonable regulations governing student conduct.

In *United States v. O'Brien*, 391 U. S. 367 (1968), the Court dealt with incidental restrictions on free speech occasioned by the exercise of the governmental power to conscript men for military service. O'Brien had burned his Selective Service registration certificate on the steps

of a courthouse in order to dramatize his opposition to the draft and to our country's involvement in Vietnam. He was convicted of violating a provision of the Selective Service law that had recently been amended to prohibit knowing destruction or mutilation of registration certificates. O'Brien argued that the purpose and effect of the amendment were to abridge free expression and that the statutory provision was therefore unconstitutional, both as enacted and as applied to him. Although O'Brien's activity involved "conduct" rather than pure "speech," the Court did not define away the First Amendment concern, and neither did it rule that the presence of a communicative intent necessarily rendered O'Brien's actions immune to governmental regulation. Instead, it enunciated the following four-part test:

"[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 377.

Of course, none of these precedents directly controls the instant case. In *O'Brien* the Court considered a federal statute which on its face prohibited certain conduct having no necessary connection with freedom of speech. This led the Court to differentiate between "speech" and "nonspeech" elements of a single course of conduct, a distinction that has little relevance here. Both *Tinker* and *Healy* concerned First and Fourteenth Amendment liberties in the context of state educational institutions, a circumstance involving rather different governmental interests than are at stake here. In broader terms, however, these precedents involved inci-

dental restrictions on First Amendment liberties by governmental action in furtherance of legitimate and substantial state interest other than suppression of expression. In this sense these cases are generally analogous to our present inquiry.

The case at hand arises in the context of prisons. One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task. The identifiable governmental interests at stake in this task are the preservation of internal order and discipline,¹² the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners. While the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation,¹³ the legitimate govern-

¹² We need not and do not address in this case the validity of a temporary prohibition of an inmate's personal correspondence as a disciplinary sanction (usually as part of the regimen of solitary confinement) for violation of prison rules.

¹³ Policy Statement 7300.1A of the Federal Bureau of Prisons sets forth the Bureau's position regarding general correspondence by the prisoners entrusted to its custody. It authorizes all federal institutions to adopt open correspondence regulations and recognizes that any need for restrictions arises primarily from considerations of order and security rather than rehabilitation:

"Constructive, wholesome contact with the community is a valuable therapeutic tool in the overall correctional process. At the same time, basic controls need to be exercised in order to protect the security of the institution, individuals and/or the community-at-large."

The recommended policy guideline adopted by the Association of State Correctional Administrators of August 23, 1972, echoes the view that personal correspondence by prison inmates is a generally wholesome activity:

"Correspondence with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined

mental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence. Perhaps the most obvious example of justifiable censorship of prisoner mail would be refusal to send or deliver letters concerning escape plans or containing other information concerning proposed criminal activity, whether within or without the prison. Similarly, prison officials may properly refuse to transmit encoded messages. Other less obvious possibilities come to mind, but it is not our purpose to survey the range of circumstances in which particular restrictions on prisoner mail might be warranted by the legitimate demands of prison administration as they exist from time to time in the various kinds of penal institutions found in this country. Our task is to determine the proper standard for deciding whether a particular regulation or practice relating to inmate correspondence constitutes an impermissible restraint of First Amendment liberties.

Applying the teachings of our prior decisions to the instant context, we hold that censorship of prisoner mail is justified if the following criteria are met. First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate corre-

persons and may form the basis for good adjustment in the institution and the community."

spondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above.¹⁴

¹⁴ While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction. For example, Policy Statement 7300.1A of the Federal Bureau of Prisons specifies that personal correspondence of inmates in federal prisons, whether incoming or outgoing, may be rejected for inclusion of the following kinds of material:

"(1) Any material which might violate postal regulations, *i. e.*, threats, blackmail, contraband or which indicate plots of escape.

"(2) Discussions of criminal activities.

"(3) No inmate may be permitted to direct his business while he is in confinement. This does not go to the point of prohibiting correspondence necessary to enable the inmate to protect the property and funds that were legitimately his at the time he was committed to the institution. Thus, an inmate could correspond about refinancing a mortgage on his home or sign insurance papers, but he could not operate a mortgage or insurance business while in the institution.

"(4) Letters containing codes or other obvious attempts to circumvent these regulations will be subject to rejection.

"(5) Insofar as possible, all letters should be written in English, but every effort should be made to accommodate those inmates who are unable to write in English or whose correspondents would be unable to understand a letter written in English. The criminal sophistication of the inmate, the relationship of the inmate and the

C

On the basis of this standard, we affirm the judgment of the District Court. The regulations invalidated by that court authorized, *inter alia*, censorship of statements that "unduly complain" or "magnify grievances," expression of "inflammatory political, racial, religious or other views," and matter deemed "defamatory" or "otherwise inappropriate." These regulations fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship. Not surprisingly, some prison officials used the extraordinary latitude for discretion authorized by the regulations to suppress unwelcome criticism. For example, at one institution under the Department's jurisdiction, the checklist used by the mailroom staff authorized rejection of letters "criticizing policy, rules or officials," and the mailroom sergeant stated in a deposition that he would reject as "defamatory" letters "belittling staff or our judicial system or anything connected with Department of Corrections." Correspondence was also censored for "disrespectful comments," "derogatory remarks," and the like.

Appellants have failed to show that these broad restrictions on prisoner mail were in any way necessary to the furtherance of a governmental interest unrelated to the suppression of expression. Indeed, the heart of appellants' position is not that the regulations are justified by a legitimate governmental interest but that they do not need to be. This misconception is not only stated affirmatively; it also underlies appellants' discussion of the particular regulations under attack. For example, appellants' sole defense of the prohibition against matter that is "defamatory" or "otherwise inappropriate" is that

correspondent are factors to be considered in deciding whether correspondence in a foreign language should be permitted."

it is "within the discretion of the prison administrators." Brief for Appellants 21. Appellants contend that statements that "magnify grievances" or "unduly complain" are censored "as a precaution against flash riots and in the furtherance of inmate rehabilitation." *Id.*, at 22. But they do not suggest how the magnification of grievances or undue complaining, which presumably occurs in outgoing letters, could possibly lead to flash riots, nor do they specify what contribution the suppression of complaints makes to the rehabilitation of criminals. And, appellants defend the ban against "inflammatory political, racial, religious or other views" on the ground that "[s]uch matter clearly presents a danger to prison security" *Id.*, at 21. The regulation, however, is not narrowly drawn to reach only material that might be thought to encourage violence nor is its application limited to incoming letters. In short, the Department's regulations authorized censorship of prisoner mail far broader than any legitimate interest of penal administration demands and were properly found invalid by the District Court.¹⁵

¹⁵ After the District Court held the original regulations unconstitutional, revised regulations were developed by appellants and approved by the court. Supplement to App. 194-200, 211. Although these regulations are not before us for review, they are indicative of one solution to the problem. The following provisions govern censorship of prisoner correspondence:

"CORRESPONDENCE

"A. Criteria for Disapproval of Inmate Mail

"1. Outgoing Letters

"Outgoing letters from inmates of institutions not requiring approval of inmate correspondents may be disapproved for mailing only if the content falls as a whole or in significant part into any of the following categories:

"a. The letter contains threats of physical harm against any person or threats of criminal activity.

[Footnote 15 is continued on p. 417]

D

We also agree with the District Court that the decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards.

"b. The letter threatens blackmail mail or extortion.

"c. The letter concerns sending contraband in or out of the institutions.

"d. The letter concerns plans to escape.

"e. The letter concerns plans for activities in violation of institutional rules.

"f. The letter concerns plans for criminal activity.

"g. The letter is in code and its contents are not understood by reader.

"h. The letter solicits gifts of goods or money from other than family.

"i. The letter is obscene.

"j. The letter contains information which if communicated would create a clear and present danger of violence and physical harm to a human being. Outgoing letters from inmates of institutions requiring approval of correspondents may be disapproved only for the foregoing reasons, or if the addressee is not an approved correspondent of the inmate and special permission for the letter has not been obtained.

"2. Incoming Letters

"Incoming letters to inmates may be disapproved for receipt only for the foregoing reasons, or if the letter contains material which would cause severe psychiatric or emotional disturbance to the inmate, or in an institution requiring approval of inmate correspondents, is from a person who is not an approved correspondent and special permission for the letter has not been obtained.

"3. Limitations

"Disapproval of a letter on the basis that it would cause severe psychiatric or emotional disturbance to the inmate may be done only by a member of the institution's psychiatric staff after consultation with the inmate's caseworker. The staff member may disapprove the letter only upon a finding that receipt of the letter would be likely to affect prison discipline or security or the inmate's rehabilitation, and that there is no reasonable alternative means of ameliorating the disturbance of the inmate. Outgoing or incoming letters

The interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a "liberty" interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment. As such, it is protected from arbitrary governmental invasion. See *Board of Regents v. Roth*, 408 U. S. 564 (1972); *Perry v. Sindermann*, 408 U. S. 593 (1972). The District Court required that an inmate be notified of the rejection of a letter written by or addressed to him, that the author of that letter be given a reasonable opportunity to protest that decision, and that complaints be referred to a prison official other than

may not be rejected solely upon the ground that they contain criticism of the institution or its personnel.

"4. Notice of Disapproval of Inmate Mail

"a. When an inmate is *prohibited from sending* a letter, the letter and a written and signed notice stating one of the authorized reasons for disapproval and indicating the portion or portions of the letter causing disapproval will be given the inmate.

"b. When an inmate is *prohibited from receiving* a letter, the letter and a written and signed notice stating one of the authorized reasons for disapproval and indicating the portion or portions of the letter causing disapproval will be given the sender. The inmate will be given notice in writing that a letter has been rejected, indicating one of the authorized reasons and the sender's name.

"c. Material from correspondence which violates the provisions of paragraph one may be placed in an inmate's file. Other material from correspondence may not be placed in an inmate's file unless it has been lawfully observed by an employee of the department and is relevant to assessment of the inmate's rehabilitation. However, such material which is not in violation of the provisions of paragraph one may not be the subject of disciplinary proceedings against an inmate. An inmate shall be notified in writing of the placing of any material from correspondence in his file.

"d. Administrative review of inmate grievances regarding the application of this rule may be had in accordance with paragraph DP-1003 of these rules."

the person who originally disapproved the correspondence. These requirements do not appear to be unduly burdensome, nor do appellants so contend. Accordingly, we affirm the judgment of the District Court with respect to the Department's regulations relating to prisoner mail.

II

The District Court also enjoined continued enforcement of Administrative Rule MV-IV-02, which provides in pertinent part:

"Investigators for an attorney-of-record will be confined to not more than two. Such investigators must be licensed by the State or must be members of the State Bar. Designation must be made in writing by the Attorney."

By restricting access to prisoners to members of the bar and licensed private investigators, this regulation imposed an absolute ban on the use by attorneys of law students and legal paraprofessionals to interview inmate clients. In fact, attorneys could not even delegate to such persons the task of obtaining prisoners' signatures on legal documents. The District Court reasoned that this rule constituted an unjustifiable restriction on the right of access to the courts. We agree.

The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. *Ex parte Hull*, 312 U. S. 546 (1941).

The District Court found that the rule restricting attorney-client interviews to members of the bar and licensed private investigators inhibited adequate professional representation of indigent inmates. The remoteness of many California penal institutions makes a personal visit to an inmate client a time-consuming undertaking. The court reasoned that the ban against the use of law students or other paraprofessionals for attorney-client interviews would deter some lawyers from representing prisoners who could not afford to pay for their traveling time or that of licensed private investigators. And those lawyers who agreed to do so would waste time that might be employed more efficaciously in working on the inmates' legal problems. Allowing law students and paraprofessionals to interview inmates might well reduce the cost of legal representation for prisoners. The District Court therefore concluded that the regulation imposed a substantial burden on the right of access to the courts.

As the District Court recognized, this conclusion does not end the inquiry, for prison administrators are not required to adopt every proposal that may be thought to facilitate prisoner access to the courts. The extent to which that right is burdened by a particular regulation or practice must be weighed against the legitimate interests of penal administration and the proper regard that judges should give to the expertise and discretionary authority of correctional officials. In this case the ban against the use of law students and other paraprofessional personnel was absolute. Its prohibition was not limited to prospective interviewers who posed some colorable threat to security or to those inmates thought to be especially dangerous. Nor was it shown that a less restrictive regulation would unduly burden the administrative task of screening and monitoring visitors.

Appellants' enforcement of the regulation in question also created an arbitrary distinction between law students employed by practicing attorneys and those associated with law school programs providing legal assistance to prisoners.¹⁶ While the Department flatly prohibited interviews of any sort by law students working for attorneys, it freely allowed participants of a number of law school programs to enter the prisons and meet with inmates. These largely unsupervised students were admitted without any security check other than verification of their enrollment in a school program. Of course, the fact that appellants have allowed some persons to conduct attorney-client interviews with prisoners does not mean that they are required to admit others, but the arbitrariness of the distinction between the two categories of law students does reveal the absence of any real justification for the sweeping prohibition of Administrative Rule MV-IV-02. We cannot say that the District Court erred in invalidating this regulation.

This result is mandated by our decision in *Johnson v. Avery*, 393 U. S. 483 (1969). There the Court struck down a prison regulation prohibiting any inmate from advising or assisting another in the preparation of legal documents. Given the inadequacy of alternative sources of legal assistance, the rule had the effect of denying to illiterate or poorly educated inmates any opportunity to vindicate possibly valid constitutional claims. The Court found that the regulation impermissibly burdened the right of access to the courts despite the not insignificant state interest in preventing the establishment of personal power structures by unscrupulous jailhouse lawyers and the attendant problems of prison discipline that

¹⁶ Apparently, the Department's policy regarding law school programs providing legal assistance to inmates, though well established, is not embodied in any regulation.

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follow. The countervailing state interest in *Johnson* is, if anything, more persuasive than any interest advanced by appellants in the instant case.

The judgment is

Affirmed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring.

I

I concur in the opinion and judgment of the Court. I write separately only to emphasize my view that prison authorities do not have a general right to open and read all incoming and outgoing prisoner mail. Although the issue of the First Amendment rights of inmates is explicitly reserved by the Court, I would reach that issue and hold that prison authorities may not read inmate mail as a matter of course.

II

As Mr. Justice Holmes observed over a half century ago, "the use of the mails is almost as much a part of free speech as the right to use our tongues . . ." *Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 437 (1921) (dissenting opinion), quoted with approval in *Blount v. Rizzi*, 400 U. S. 410, 416 (1971). See also *Lamont v. Postmaster General*, 381 U. S. 301, 305 (1965). A prisoner does not shed such basic First Amendment rights at the prison gate.¹ Rather, he "retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from

¹ See, e. g., *Cruz v. Beto*, 405 U. S. 319 (1972); *Cooper v. Pate*, 378 U. S. 546 (1964); *Brown v. Peyton*, 437 F. 2d 1228, 1230 (CA4 1971); *Rowland v. Sigler*, 327 F. Supp. 821, 827 (Neb. 1971), aff'd, 452 F. 2d 1005 (CA8 1971); *Fortune Society v. McGinnis*, 319 F. Supp. 901, 903 (SDNY 1970).

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him by law." *Coffin v. Reichard*, 143 F. 2d 443, 445 (CA6 1944).² Accordingly, prisoners are, in my view, entitled to use the mails as a medium of free expression not as a privilege, but rather as a constitutionally guaranteed right.³

It seems clear that this freedom may be seriously infringed by permitting correctional authorities to read all prisoner correspondence. A prisoner's free and open expression will surely be restrained by the knowledge that his every word may be read by his jailors and that his message could well find its way into a disciplinary file, be the object of ridicule, or even lead to reprisals. A similar pall may be cast over the free expression of the inmates' correspondents. Cf. *Talley v. California*, 362 U. S. 60, 65 (1960); *NAACP v. Alabama*, 357 U. S. 449, 462 (1958). Such an intrusion on First Amendment freedoms can only be justified by a substantial government interest and a showing that the means chosen to effectuate the State's purpose are not unnecessarily restrictive of personal freedoms.

"[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more

² Accord, *Moore v. Ciccone*, 459 F. 2d 574, 576 (CA8 1972); *Nolan v. Fitzpatrick*, 451 F. 2d 545, 547 (CA1 1971); *Brenneman v. Madigan*, 343 F. Supp. 128, 131 (ND Cal. 1972); *Burnham v. Oswald*, 342 F. Supp. 880, 884 (WDNY 1972); *Carothers v. Follette*, 314 F. Supp. 1014, 1023 (SDNY 1970).

³ See, e. g., *Sostre v. McGinnis*, 442 F. 2d 178, 199 (CA2 1971) (en banc); *Preston v. Thieszen*, 341 F. Supp. 785, 786-787 (WD Wis. 1972); cf. *Gray v. Creamer*, 465 F. 2d 179, 186 (CA3 1972); *Morales v. Schmidt*, 340 F. Supp. 544 (WD Wis. 1972); *Palmigiano v. Travisono*, 317 F. Supp. 776 (RI 1970); *Carothers v. Follette*, *supra*.

narrowly achieved." *Shelton v. Tucker*, 364 U. S. 479 488 (1960).⁴

The First Amendment must in each context "be applied 'in light of the special characteristics of the . . . environment,'" *Healy v. James*, 408 U. S. 169, 180 (1972), and the exigencies of governing persons in prisons are different from and greater than those in governing persons without. *Barnett v. Rodgers*, 133 U. S. App. D. C. 296, 301-302, 410 F. 2d 995, 1000-1001 (1969); *Rowland v. Sigler*, 327 F. Supp. 821, 827 (Neb.), aff'd, 452 F. 2d 1005 (CA8 1971). The State has legitimate and substantial concerns as to security, personal safety, institutional discipline, and prisoner rehabilitation not applicable to the community at large. But these considerations do not eliminate the need for reasons imperatively justifying the particular deprivation of fundamental constitutional rights at issue. Cf. *Healy v. James*, *supra*, at 180; *Tinker v. Des Moines School District*, 393 U. S. 503, 506 (1969).

The State asserts a number of justifications for a general right to read all prisoner correspondence. The State argues that contraband weapons or narcotics may be smuggled into the prison via the mail, and certainly this is a legitimate concern of prison authorities. But this argument provides no justification for reading outgoing mail. Even as to incoming mail, there is no showing that stemming the traffic in contraband could not be accomplished equally well by means of physical tests

⁴ The test I would apply is thus essentially the same as the test applied by the Court:

"[T]he regulation . . . in question must further an important or substantial governmental interest unrelated to the suppression of expression . . . [and] the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Ante*, at 413.

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such as fluoroscoping letters.⁵ If physical tests were inadequate, merely opening and inspecting—and not reading—incoming mail would clearly suffice.⁶

It is also suggested that prison authorities must read all prison mail in order to detect escape plans. The State surely could not justify reading everyone's mail and listening to all phone conversations on the off chance that criminal schemes were being concocted. Similarly, the reading of all prisoner mail is too great an intrusion on First Amendment rights to be justified by such a speculative concern. There has been no showing as to the seriousness of the problem of escapes planned or arranged via the mail. Indeed, the State's claim of concern over this problem is undermined by the general practice of permitting unmonitored personal interviews during which any number of surreptitious plans might be discussed undetected.⁷ When prison authorities have reason to believe that an escape plot is being hatched by a particular inmate through his correspondence, they may well have an adequate basis to seize that inmate's letters; but there is no such justification for a blanket policy of reading all prison mail.

It is also occasionally asserted that reading prisoner mail is a useful tool in the rehabilitative process. The therapeutic model of corrections has come under increasing criticism and in most penal institutions rehabilitative programs are more ideal than reality.⁸ Assuming the validity of the rehabilitative model, however, the State does not demonstrate that the reading of inmate

⁵ See *Marsh v. Moore*, 325 F. Supp. 392, 395 (Mass. 1971).

⁶ See *Moore v. Ciccone*, 459 F. 2d, at 578 (Lay, J., concurring); cf. *Jones v. Wittenberg*, 330 F. Supp. 707, 719 (ND Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F. 2d 854 (CA6 1972).

⁷ *Palmigiano v. Travisono*, 317 F. Supp. 776 (RI 1970).

⁸ See generally J. Mitford, *Kind and Usual Punishment: The Prison Business* (1973).

mail, with its attendant chilling effect on free expression, serves any valid rehabilitative purpose. Prison walls serve not merely to restrain offenders but also to isolate them. The mails provide one of the few ties inmates retain to their communities or families—ties essential to the success of their later return to the outside world.⁹ Judge Kaufman, writing for the Second Circuit, found two observations particularly apropos to similar claims of rehabilitative benefit in *Sostre v. McGinnis*, 442 F. 2d 178, 199 (1971) (en banc):

“Letter writing keeps the inmate in contact with the outside world, helps to hold in check some of the morbidity and hopelessness produced by prison life and isolation, stimulates his more natural and human impulses, and otherwise may make contributions to better mental attitudes and reformation.”¹⁰

and:

“The harm censorship does to rehabilitation . . . cannot be gainsaid. Inmates lose contact with the outside world and become wary of placing intimate thoughts or criticisms of the prison in letters. This artificial increase of alienation from society is ill advised.”¹¹

The Court today agrees that “the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation.” *Ante*, at 412.¹²

⁹ See, e. g., National Advisory Commission on Criminal Justice Standards and Goals, Corrections 67-68 (1973).

¹⁰ See *Palmigiano v. Travisono*, *supra*, at 791.

¹¹ Singer, *Censorship of Prisoners' Mail and the Constitution*, 56 A. B. A. J. 1051, 1054 (1970).

¹² Various studies have strongly recommended that correctional authorities have the right to inspect mail for contraband but not to read it. National Advisory Commission on Criminal Justice Stand-

Balanced against the State's asserted interests are the values that are generally associated with freedom of speech in a free society—values which “do not turn to dross in an unfree one.” *Sostre v. McGinnis*, *supra*, at 199. First Amendment guarantees protect the free and uninterrupted interchange of ideas upon which a democratic society thrives. Perhaps the most obvious victim of the indirect censorship effected by a policy of allowing prison authorities to read inmate mail is criticism of prison administration. The threat of identification and reprisal inherent in allowing correctional authorities to read prisoner mail is not lost on inmates who might otherwise criticize their jailors. The mails are one of the few vehicles prisoners have for informing the community about their existence and, in these days of strife in our correctional institutions, the plight of prisoners is a matter of urgent public concern. To sustain a policy which chills the communication necessary to inform the public on this issue is at odds with the most basic tenets of the guarantee of freedom of speech.¹³

The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.¹⁴ Cf. *Stanley v. Georgia*, 394 U. S.

ards and Goals, Corrections, Standard 2.17, pp. 66-69 (1973); see California Board of Corrections, California Correctional System Study: Institutions 40 (1971); Center for Criminal Justice, Boston University Law School, Model Rules and Regulations on Prisoners' Rights and Responsibilities, Standards IC-1 and IC-2, pp. 46-47 (1973).

¹³ See, e. g., *Nolan v. Fitzpatrick*, 451 F. 2d, at 547-548.

¹⁴ Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 879-880 (1963).

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557 (1969). Such restraint may be "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him." J. Milton, *Aeropagitica* 21 (Everyman's ed. 1927). When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry authoring his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.

MR. JUSTICE DOUGLAS joins in Part II of this opinion.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring in the judgment.

I have joined Part II of MR. JUSTICE MARSHALL's opinion because I think it makes abundantly clear that foremost among the Bill of Rights of prisoners in this country, whether under state or federal detention, is the First Amendment. Prisoners are still "persons" entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all of the requirements of due process.

While Mr. Chief Justice Hughes in *Stromberg v. California*, 283 U. S. 359, stated that the First Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth, it has become customary to

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rest on the broader foundation of the entire Fourteenth Amendment. Free speech and press within the meaning of the First Amendment is, in my judgment, one of the pre-eminent privileges and immunities of all citizens.